149 US 368

RECORD, CASE No. 13,636.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~417~~. 89

THE BALTIMORE AND OHIO RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN BAUGH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO.

FILED SEPTEMBER 17, 1889.

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1 At a stated term of the circuit court of the United States of America within and for the eastern division of the sourtern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, O., in said district, on the first Tuesday of June, being also the fifth day of that month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and twelfth—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

JOHN BAUGH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY Defendant.

At law.

Be it remembered that heretofore, to wit, on the 1st day of June, in the year of our Lord one thousand eight hundred and eighty-six, came the plaintiff, John Baugh, by his attorneys, L. Danford
and J. C. Tallman, and filed in the clerk's office of said court
2 his certain transcript in this cause, clothed in the words and
figures following, to wit:

Transcript.

Pleas before the court of common pleas within and for the county of Belmont and State of Ohio, at a term thereof began and held in the court-house, at St. Clairsville, on Tuesday, the 12th day of January, in the year of our Lord one thousand eight hundred and eighty-six.

JOHN BAUGH
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.
No. 3524. App. Doc. 26, p. 362.

Be it remembered that heretofore, to wit, on the 21st day of September, 1885, came the plaintiff, by L. Danford and James C. Tallman, his attorneys, and filed in the clerk's office of said court his certain petition herein; which petition is in the words and figures following, to wit:

STATE OF OHIO,
Belmont County, *ss:*

Court of Common Pleas.

JOHN BAUGH
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY (a Corporation),
Defendant.

Petition.

3 The plaintiff says the defendant is a railroad corporation

and at the happening of the grievances herein complained of was operating a certain line of railroad known as the Central Ohio division of the Baltimore and Ohio railroad, running from Bellaire, in Belmont county, to Columbus, Ohio, and was the owner of the tracks, cars, engines, and other appliances for operating said road.

That at the same time the plaintiff was in the employment of defendant as a fireman upon what is called the "helper," being an engine and tender used as a helper between Bellaire and the turntable at the top of the grade, about 21 miles west of Bellaire, in Belmont county, Ohio. The control and management of said helper—the time when it would start and when it would stop on its return trip to Bellaire—was placed by the defendant in the hands of the engineer, there being no conductor or other representative of the company on the helper, and the plaintiff was under the control of and made subject to the orders and directions of the engineer aforesaid, whom the said defendant had negligently and carelessly employed and placed in charge of said helper.

That on May 4th, 1885, while the plaintiff was in the employ of the defendant and in the discharge of his duties as aforesaid, the defendant, its agents and representatives, were so careless, negligent,
and unskillful in the running and management of said
4 "helper" as to run the same going *going* east from Belmont
to Lewis' Mills upon the same time and upon the schedule
time of another train of defendants going west from Lewis' Mills to Belmont, so that said helper and train, while both were running at a high rate of speed in opposite directions upon a single track, collided at a point between said stations, and the plaintiff while in the discharge of his duties and without fault on his part was (in the collision caused by the negligence of defendants as aforesaid) greatly and permanently injured, being mangled and bruised to such an extent that his right arm had to be amputated near the shoulder; that he is unable to use his right leg in walking, and is otherwise severely injured and hurt, causing him great pain and suffering and permanently injuring and disabling him to such an extent that he cannot hereafter earn his own living by manual labor, which was the only means of earning a livelihood that plaintiff had, whereby the plaintiff has been damaged in the sum of thirty thousand dollars, for which sum the plaintiff prays judgment.

L. DANFORD & J. C. TALLMAN,
Pl'ff's Att'ys.

And on the same day came the plaintiff and filed in the clerk's office of said court an affidavit herein as follows, to wit:

John Baugh, being first duly sworn, says the statements made in this his foregoing petition are true as he believes.

JOHN BAUGH.

Sworn to before me by John Baugh and by him subscribed
5 in my presence Sept. 19, A. D. 1885.

D. B. CRATTY, [SEAL.]
Notary Public.

And on the same day came the said plaintiff, by his attorneys, and filed in the clerk's office of said court a præcipe for summons herein in the words and figures following, to wit:

JOHN BAUH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY (a Corporation), Defendant.

Præcipe.

To the clerk:

Issue summons for defendant. Endorse: "Amount claimed, thirty thousand dollars."

L. DANFORD & J. C. TALLMAN,
Pl'ff's Att'ys.

Thereupon, on the præcipe of the attorneys for the plaintiff, there was issued out of the clerk's office of said court a writ of summons herein in the words and figures following, to wit:

THE STATE OF OHIO,
Belmont County, } *ss:*

To the sheriff of Belmont county, Greeting:

You are hereby commanded to notify the defendant, The Baltimore and Ohio Railroad Company (a corporation), that it has been sued by John Baugh, plaintiff, in the court of common pleas of Belmont county, Ohio, and that unless it answer by the 24th day
6 of October, A. D. 1885, the petition of said plaintiff against it filed in the clerk's office of said court will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 5th day of October, A. D. 1885.

[SEAL.] Witness my signature and the seal of said court, at St. Clairsville, in said county of Belmont, this 21st day of Sept., A. D. 1885.

WILLIAM B. CASH,
Clerk of said Court,
By D. H. MILLIGAN,
Deputy Clerk.

Summons endorsed: "Amount claimed, thirty thousand dollars."

And afterward, on the 28th day of September, 1885, said summons was returned and filed in the clerk's office of said court, with the sheriff's return thereon endorsed as follows, to wit:

Received this writ September 21st, 1885, at 2 o'clock p. m., and on the 24th day of September, 1885, I made search, and the president, vice-president, secretary, and treasurer of the defendant herein not being found in my county I made service by delivering to J. R. Lane, ticket agent and chief officer of the Baltimore and Ohio Railroad Co. found in my county, a true copy of this writ with endorsements thereof.

L. C. SEDWICK, *Sheriff.*

Sheriff's fees, $5.25.

7 And afterward, on the 29th day of October, 1885, came the defendant, by J. H. Collins, its attorney, and filed in the clerk's office of said court a demurrer herein in the words and figures following, to wit:

THE STATE OF OHIO, }
Belmont County. }

Court of Common Pleas.

JOHN BAUGH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant. } Demurrer.

The said defendant, The Baltimore and Ohio Railroad Co., now comes and demurs to the petition of said plaintiff and for cause shows that said petition does not state facts sufficient to constitute a cause of action against this defendant, and that the same is not sufficient in law.

J. H. COLLINS,
Att'y for Def't.

And afterward, on the 10th day of November, 1885, at the fall term, 1885, of said court, the following proceedings were had herein and entered on the journal hereof, to wit:

This cause came on to be heard upon the demurrer of the defendant to petition of plaintiff; the same was argued by counsel and submitted to the court. On consideration whereof the court, being fully advised — the premises, overruled said demurrer.

8 And afterward, on the 5th day of December, 1885, came J. H. Collins, attorney for the defendant, and filed in the clerk's office of said court a petition for removal to the circuit court of the United States for the southern district of Ohio, eastern division, which petition is *on* the words and figures following, to wit:

In the Common Pleas, Belmont County, State of Ohio.

JOHN BAUGH
vs.
BALTIMORE AND OHIO RAILROAD CO. }

Petition for Removal to the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

Your petitioner, The Baltimore and Ohio Railroad Co., respectfully represents that the matter in dispute in this cause exceeds, exclusive of costs, the sum or value of five hundred dollars, and that this

petition is filed at or before the term at which said cause could be first tried and before the trial thereof; that this action is a suit of a civil nature between John Baugh as plaintiff, who was at the commencement of this suit and still is a citizen of the State of Ohio, and the Baltimore and Ohio Railroad Company, a corporation duly incorporated under the laws of the State of Ohio, and the
9 Baltimore and Ohio Railroad Co., a corporation duly incorporated under the laws of the State of Maryland, and a citizen of said last-named State.

Your petitioner has made and her-with files a bond, with good and sufficient surety, for its entering in the said circuit court for the southern district of Ohio, eastern division aforesaid, on the 1st day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court if said court shall hold that this suit shall have been wrongfully or improperly removed thereto, and it prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the southern district of Ohio, eastern division; and it will ever pray.

J. H. COLLINS,
Att'y for Defendant.

And on the same day came Samuel Spencer and filed in the clerk's office of said court an affidavit herein as follows, to wit:

STATE OF MARYLAND, } *ss:*
City of Baltimore, }

Samuel Spencer, being duly sworn, says that he is vice-president of the Baltimore and Ohio Railroad Co., and that the statements and allegations contained in the foregoing petition are true to the
10 best of his knowledge, information, and belief.

SAMUEL SPENCER.

Subscribed and sworn to before me, a justice of the peace of the State of Maryland in and for the city — Baltimore, this 2nd day of October, 1885.

ROBERT A. THURSBY, *J. P.*

Appended to which affidavit is the following certificate, to wit:

STATE OF MARYLAND, }
Baltimore City. }

I hereby certify that Robert A. Thursby, Esq., before whom the annexed affidavit was made and who has thereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice, and verily believe the signature to be his genuine signature.

In testimony whereof I hereunto set my hand and affix the seal of the superior court of Baltimore city this 3rd day of October, A. D. 1885.

JAMES BOND,
Clerk of the Superior Court of Baltimore City. [SEAL.]

And on the same day came the defendant and filed in the clerk's office of said court its bond for removal herein in words
11 and figures following, to wit:

Know all men by these presents that we, The Baltimore and Ohio Railroad Company, as principal, and J. H. Collins and I. H. Patterson, as sureties, are held and firmly bound unto John Baugh in the penal sum of five hundred dollars; — the payment whereof, well and truly to be made unto the said John Baugh, his representatives and assigns, we bind ourselves, our heirs, representatives, successors, & assigns, jointly and severally, firmly by these presents.

Whereas the Baltimore and Ohio Railroad Company has filed its petition in the common pleas court, Belmont county, State of Ohio, asking for the removal to the circuit court of the United States in and for the southern district of Ohio, eastern division, — a certain cause wherein John Baugh is plaintiff and The Baltimore and Ohio Railroad Company is defendant: Now, the condition of the above obligation is such that if the said Baltimore and Ohio Railroad Co. shall enter in the said circuit court of the United States for the district aforesaid, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

12 Witness the corporate name of the said Baltimore and Ohio Railroad Company, by Samuel Spencer, its vice-president, and its corporate seal, on the 2nd day of October, 1885.

[SEAL.] THE BALTIMORE & OHIO RAILROAD COMPANY,
By SAMUEL SPENCER, *Vice-President.*

Attest: W. H. IJAMS, *Secretary.*

J. H. COLLINS. [SEAL.]
I. H. PATTERSON. [SEAL.]

And afterward, on the 30th day of January, 1886, at the spring term, 1886, of said court, the following proceedings were had herein and entered on the journal hereof, to wit:

The defensant having filed its petition and bond for removal of this case to the circuit court of the United States for the southern district of Ohio, and the bond being found sufficient, it is ordered that no further proceedings be had in this cause in this court.

THE STATE OF OHIO, }
Belmont County, } *ss:*

I, William B. Cash, clerk of the court of common pleas, a court of record within and for said county, and in whose custody the files, journals, and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is
13 a full, true, and complete transcript of the record of the proceedings had in said court in the foregoing case of John Baugh against The Baltimore and Ohio Railroad Co., and that the foregoing transcript has been compared by me with the original record of said case, and that the same is a correct transcript thereof.

Witness my signature, as clerk, and the seal of said court, at St. Clairsville, Ohio, this 20th day of March, A. D. 1886.

WILLIAM B. CASH, *Clerk.*

Costs in State court, $27.50.
Paid by J. H. Collins, for defendant.

And afterwards, to wit, on the 10th day of June, A. D. 1886, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal A, 532.

Upon the application of the defendant in the foregoing-stated case and for good cause shown, thirty days' further time is granted defendant to file its answers therein.

14 And afterwards, to wit, on the 9th day of June, A. D. 1886, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN BAUGH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD CO., Defendant.

Answer.

First answer. The defendant, The Baltimore and Ohio Railroad Company, answering the petition of said plaintiff and admitting its corporate organization as stated therein and admitting the statements of the petition with reference to its business and possession of a railroad and cars, &c., and admitting that plaintiff was in its employ and was injured by reason of a collision by the engine on which he was employed as a fireman and a train on defendant's road, *it* denies each and all the other averments of the petition and says that the same are not true.

Second answer. The defendant, by way of a second answer, says that the Baltimore and Ohio Employés' Relief Association was and

is a corporation duly incorporated by the act of the General
15 Assembly of the State of Maryland entitled "An act to
incorporate the Baltimore and Ohio Employés' Relief Association," approved May 3rd, 1882; which act of incorporation is as follows:

"An act to incorporate the Baltimore and Ohio Employés' Relief Association."

SECTION 1. Be it enacted by the General Assembly of Maryland, that John W. Garrett, William M. Clements, Samuel R. Johnston, N. E. Chapman, Andrew Anderson, David Lee, William Frabklin, William H. Harrison, G. N. Serpell, Arthur Sinsel and William T. Bernard, and their successors, chosen as a committee of management and a board of trustees in the manner hereinafter provided, shall be a corporation under the name of the " Baltimore and Ohio Employ-s' Relief Association," the objects of which shall be to extend relief in case of sickness injury old age and death, to the employés of the Baltimore and Ohio Railroad Co. and their families and also the *the* employés of such other railroad companies as this association may permit to participate in its benefits and to the families of such employés; to receive deposits on interest from said employés and their wives and to loan them money at lawful rates of interest in order to provide them with or to improve homesteads and generally to promote their welfare. It shall be a condition precedent to the making of any engagements by this association for either of above-mentioned purposes, that the directors of the Baltimore and Ohio Rail-
16 road Company shall by resolution, guarantee the faithful per-
formance of the obligations of the association, which shall make no contract beyond such guarantee or after the repeal of the resolutions authorizing same.

The powers of relief belonging to the association shall be exercised by the committee of management consisting of ten persons one of whom shall be the president, or the president *pro tempore*, of the Baltimore and Ohio Railroad Co. four of whom shall be appointed by the president of the Baltimore and Ohio Railroad Company and five elected annually by the members of the association.

The powers of receiving money of said employés and their wives on deposit, and making loans and all other investments of the funds of the association, shall be vested in a board of trustees, consisting of five persons, three of whom shall be appointed by the president of the Baltimore and Ohio Railroad Company, and two elected annually by those depositing in the savings fund of the association.

Elections for those members of the committee of management and the members of the board of trustees not appointed by the Baltimore and Ohio Railroad Co. shall be held at the time and place and in the manner set forth in the constitution and by-laws of the association and any vacancies occurring in either board shall be filled in the manner provided by the constitution and by-laws of the association.

17 Any of the employés above mentioned, upon subscribing
to the constitution and by-laws of the association, and per-

formeing all other obligations required to constitute membership in the association, shall have the privilege of voting for members of the committee of management or trustees as the case may be, either in person or by proxy.

SECTION 2. And be it enacted that this association shall have power to sue and be sued, complain and defend in any court of law or equity; to make and use a common seal or seals for its board of trustees and committee of management respectively and alter the same at pleasure to acquire by purchase, gift, devise or bequest or in any other manner, and take, hold and receive, use employ, manage, sell, lease, mortgage, or otherwise dispose of, or in any manner not inconsistent with law, deal in property, real, personal or mixed, and situated in or out of this State, which may be necessary or proper for said corporation in carrying on its operations and generally, to do every other act or thing not inconsistent with law, which may be necessary to promote the objects and purposes for which the said association is formed.

The committee of management and the board of trustees may each adopt such constitution and by-laws, rules and regulations as may be deemed proper and necessary to accomplish the objects of the
association, intrusted to these respective boards, that are not
18 inconsistent with the laws of the State of Maryland and of
the United States; and they may from time to time alter,
amend or repeal any provision of the constitution or by-laws, rules or regulations. Such by-laws or constitution may prescribe the terms and conditions on which members of the association and the beneficiaries thereof shall become entitled to the benefits provided by the association.

By reason of the guarantee of the Baltimore and Ohio Railroad Company herein provided for, no constitution by-laws rules or regulations nor any amendment, modification or repeal thereof shall have any force until the same shall be approved by the Baltimore and Ohio Railroad Co.

The Baltimore and Ohio Railroad Co. is authorized from time to time to give such aid to said association by contributions of money or otherwise, and on such terms and conditions as the president and directors may prescribe.

SECTION 3. And be it enacted, That this act shall take effect from the date of its passage, and shall be subject to amendment, modification or repeal by the legislature of this State.

Approved May 3, 1882."

And the defendant further avers and says that the directors of the said Baltimore and Ohio Railroad Company, by resolution duly and properly adopted after the passage of the act to incorporate said
relief association, guaranteed its faithful and true perform-
19 ance of the obligations of the association and contributed
to the capital stock thereof the sum of $100,000.00 for the
purpose of carrying out the object and purpose of the same.

The said Baltimore and Ohio Employés' Relief Association was duly and properly organized by the election and appointment of officers and a system of rules and regulations adopted by the same, a copy of which is hereto attached, marked Exhibit A; which constitution, laws, rules, and regulations were duly approved by The Baltimore and Ohio Railroad Company, the defendant herein.

On the 1st day of September, A. D. 1884, the plaintiff, John Baugh, being in the employ of the defendant as a fireman in the transportation department, made application to become a member of said The Baltimore and Ohio Employés' Relief Association. A copy of said application as signed by said plaintiff is hereto attached, marked Exhibit B, and which said application refers to the rules and regulations contained in Exhibit "A" and binds the applicant to be governed thereby, so that Exhibits "A" and "B" include his application and the contract between the plaintiff and the defendant and said relief association, and are here referred to and made a part of this answer the same as if written and copied herein in full.

On the 28th day of August, A. D. 1885, the said plaintiff, John Baugh, commenced a suit before Andrew Roder, a justice of the peace of Pultney township, Belmont Co., Ohio, against the said The
20 Baltimore and Ohio Employés' Relief Association and the defendant herein, The Baltimore and Ohio Railroad Company, setting forth in his bill of particulars filed before said justice the same accident and the same injuries resulting therefrom to the plaintiff that are set forth in the petition in this case and charging the said relief association on its said contract heretofore set forth and this defendant as the guarantor thereof, and asking judgment against both of said defendant- in said suit for the amount due him under his contract with said relief association and the defendant. Such proceedings were had in the said suit before said justice that afterward, on the 9th day of September, A. D. 1885, said cause was tried before said justice and a judgment rendered therein by the said justice in favor of the plaintiff, John Baugh, and against both the defendants for the sum of one hundred dollars ($100.00) and costs, taxed at $3 and fifty cents, which said judgment has since been paid off and satisfied by the said defendants therein.

Afterward, in the months of October and November, in the year 1885, the said plaintiff commenced two other suits similar in all respects to the one commenced August 28th, with similar averments in the bill of particulars, for the purpose of recovering sums due the plaintiff under his contract with said relief association and defendant herein accruing after the date of his first suit. All of said suits were against said relief association and this defendant, and in
21 all of said suits judgments were rendered against defendants for the several amounts claimed and costs, and were paid off in same manner the first were paid.

And the defendant says that said plaintiff, having elected to proceed under his contract with said relief association and this defendant, and having brought and prosecuted to final judgments the several suits hereinbefore set out, and having recovered judgments therein and received payment thereof for the same injuries which are set forth and complained of now in this suit, his action herein is barred and he cannot now pursue his remedy in this case to recover for the same cause of action contained in said suits before said justice.

(Signed) J. H. COLLINS,
Att'y for Defendant.

THE STATE OF OHIO, }
Franklin County. }

J. H. Collins, being duly sworn according to law, says that he is the attorney for the defendant corporation in this suit, and that he believes the facts stated in this answer are true.

J. H. COLLINS.

Sworn to before me and subscribed in my presence by J. H. Collins this 11th day of July, A. D. 1886.

[SEAL.] LORENZO D. HAGERTY,
Notary Public.

22 EXHIBIT "A."

Baltimore and Ohio Employés' Relief Association.

Constitution.

Title of association.

Article I. This society shall be known as "The Baltimore and Ohio Employés' Relief Association."

Object.

Article II. Its object shall be to provide for its members while they are disabled by accident, sickness, or by old age, and at their deaths for their families.

Article III. Such provisions shall include—

Surgical attendance.

1st. Surgical attendance for its members when injured by accident while in the discharge of duty and in the service of the Baltimore and Ohio Railroad Company, or of any other railroad company whose employés shall be admitted to the privilege of membership by a vote of the managers of this society, who shall contract with physicians and surgeons residing at all practicable points along the lines of the roads aforesaid for such attendance.

Allowance for temporary disablement.

2d. There shall be paid to every contributor of the smallest (or 1st) class thus injured by accident, while totally unable to labor, fifty cents for each working day thus lost, and to contributors of higher classes larger sums, proportioned to their contributions; but after six months' disability these payments shall be reduced one-half.

(Allowance for permanent disablement.)

23 They shall not be made until certificates satisfactory to the managers have been received from the supervisor or head of department or division that the accident occurred while the person injured was in the discharge of duty and in the company's service and from one of the society's surgeons that this accident had caused total disability for labor for the time specified in the certificate.

Indemnity for death from accident.

3rd. In the event of the death of a contributor occur-ing solely by reason of and at the time or within six months after an accident while in the discharge of duty in the service of either of the companies aforesaid—in the case of a contributor of the smallest class—there shall be paid to the person designated by him in the application for membership to receive the same, or to his legal representative if there be no such person, the sum of $500, and in the case of contributors of higher classes larger sums, proportionate to their monthly contributions; but all the payments shall be conditioned upon the certification of the requirements above specified by one of the designated surgeons of the society and by the members, head of department, or other official of high authority.

Relinquishment of claims for damages.

24 As it is not contemplated in this scheme to give double benefits in cases of disability or death resulting from accidents the benefits herein promised shall not be payable nor paid when the contributors or any person entitled to damages because of the accident to him, whether resulting in death or not, has or makes a claim against said company or any of the companies operating its branches or divisions (including the Chicago division) until there be first filed with the committee a release satisfactory to them, releasing said companies from such damages, signed by all persons entitled to the same.

Indemnity for sickness from ordinary causes.

4th. There shall be paid to every contributor of the smallest (or 1st) class in the case of injury or sickness arising from any other cause than accident occurring in the discharge of duty in the company's service while totally unable to labor fifty cents for each working day thus lost, and to contributors of higher classes larger sums, proportionate to their contributions; but these payments shall only continue one year after the employee ceases to contribute to the relief fund, and shall not be made in cases of disablement of less than six working days' duration, and then only when certificates satisfactory to the managers have been received from a duly registered medical practitioner, corroborated by the contributor's superintendent or head of department, and likewise by a certificate from one of the association's medical examiners that sickness or injury had caused total disability for labor for the time specified in the certificate of said medical practitioner.

25 In case *of* medical examiner of the association shall certify that such sickness or injury caused total disability for labor for a shorter period of time than that set forth in the certificate of the medical practitioner, then the payments specified in this connection shall be made only for the time stated in said certificate of such medical examiner.

Indemnity in case of death from natural causes.

5th. In the event of the death of a contributor occurring while in the service of either of the aforesaid companies, neither by his own act, nor by the hands of justice, nor in violation of the laws of the State wherein he was injured or died, nor by such accidents as will secure relief from this society, as already provided for in this constitution, there shall be paid, in the case of each contributor in the smallest class, to the person designated in his application for membership to receive the same, or, if there be no such person, then to his legal representative, the sum of $100, and in the case of contributors in higher classes larger sums, proportionate to their monthly contributions; conditioned, however, upon the presentation of proof satisfactory to the managers that death occurred within the requirements herein set forth.

Subscriptions.

26 Article IV. Participation in the benefits of this association shall be voluntary as regards officials receiving an annual compensation of over $2,000 and those whose duties are in nowise hazardous and such as to render them liable to railroad casualties. All other employés on the main stem, branches, and divisions are expected to subscribe to so much of its relief features as relate to indemnity for injuries or death occurring while in the discharge of duty and in the company's service.

(When employés may waive ordinary death payments.)

Employés who are unmarried or who have no immediate families dependent upon them for support may waive the benefits accruing in case of death from any cause other than from injuries received in the discharge of duty; in which case a reduction of twenty-five cents per month on smallest and proportionately larger reductions on other contributions will be allowed.

Contributors disabled from natural causes shall hold their right to death indemnity for one month.

Article V. When a contributor shall be disabled by sickness or accident from earning any wages, and it shall be so certified by a surgeon employed by the society, he shall, notwithstanding, be entitled to the benefits of this society for one month after the time for which his contributions have been paid, and also for a period extending from the day he resumes labor to the first subsequent payment of wages.

27 Nature and am't of members' contributions, 1st or smallest class.

Article VI. For the several benefits herein set forth, medical attendance, temporary disablement indemnity, allowance for death by accident and death from other causes, each member receiving a monthly compensation of $35 and under shall pay, in advance, a monthly contribution of $1.00 if engaged in operating trains or rolling stock, or 75 cts. per month if not so engaged, which shall entitle him to the benefits above assigned to the contributors in the smallest class.

Payments by 2nd class of contributors.

Those receiving over $35 and not more than $50 per month shall pay double the contributions paid by the smallest class of contributors and receive double their benefits.

Payments by 3rd-class contributors.

Those receiving over $50 and not more than $75 per month shall pay three times as much as the smallest class of contributors and receive three times their benefits.

Payments by 4th class of contributors.

Those receiving over $75 and not more than $100 per month shall pay four times as much as the smallest contributors and receive four times their benefits.

28 Payments by 5th class of contributors.

Those receiving over $100 per month shall pay five times as much as the smallest contributors and receive five times their benefits.

Provision for reducing rates of contribution or distributing surplus.

Article VII. These rates of payments shall continue only the first year of membership, and at the end of September of every year, the managers shall make up a statement of the receipts from the members and of the payments to them, and of the future liebilities of the association to them, as ascertained by some competent person to be employed by the managers for that purpose, and the whole of the surplus thus ascertained shall be used to reduce the next year's contribution or to increase the allowance for natural deaths or shall be otherwise devoted to promoting the interests of the association in such manner and at such times as shall be deemed best by the committee of management.

Uses to which company's contributions shall be applied.

Article VIII. As the Baltimore and Ohio Railroad Company for the purpose of guaranteeing the above payments and of lessening the contributions of the members of this society, have consented to

29 bear all the expenses necessary to the proper management of its affairs and have contributed $100,000 towards its funds the whole of the interest received from its contribution shall also be used every year to lessen the contributions of the company's employés.

Extra visitation of disabled members.

Article IX. The managers shall from time to time provide for the visitation of the persons on the allowance list besides that of the attending surgeon or physician and no member refusing to submit to an examination by such visitor shall be entitled to receive any benefits from the fund during the continuance of such refusal.

Payment of death liabilities.

Article X. All liabilities on account of death shall be payable within sixty days after receipt of notice of death.

Contributions—how and when collected.

Article XI. The monthly payments shall, in all cases be deducted from the wages of the members. When there are no wages no payments can be made.

30 *Committee of Management.*

Constitution of committee of management.

Article XVIII. The president of the Baltimore and Ohio Railroad Company shall be *ex officio* a member of the committee of management, which, in addition, shall consist of four members to be appointed by the Baltimore and Ohio Railroad Company and five elected by the contributors: Provided that two members of the committee of management shall be elected by those members of the association residing on the main stem and branches from among themselves; two members of the committee of management shall be elected by those members residing on the trans-Ohio divisions from among themselves, and one member of said committee shall be elected from those members residing on the Pittsburgh division and branches from among themselves.

31 Election for managers.

Article XIX. The first election for managers shall take place on the first Wed*ens*day after the first day of July, 1880, and until that election takes place the president of the Baltimore and Ohio Railroad Company shall designate the persons to represent the contributors in the board. Subsequent elections shall take place on the first Wedn-sday following the first day of January of every year.

Election by contributors.

Article XX. At these elections for managers each person shall be entitled to vote in proportion to his monthly contributions and shall have the right to vote by proxy.

Managers not entitled to comnens'n.

Article XXI. No person shall be entitled to receive any compensation or salary by reason of his service upon the committee of management.

Investment of funds.

Article XXII. The monies belonging to the fund of this society, not wanted for immediate use, shall be invested by the managers in United States bonds, Maryland State and municipal bonds, Baltimore and Ohio Railroad bonds, stocks or other obligations, and other first-class securities. All securities and the monies necessary to meet current expenses shall be entrusted to the official custody of the treasurer of the Baltimore and Ohio Railroad Company, to be held subject to the requisition of the committee of management.

Benefits guaranteed by B. & O. R. R. Co.

Article XXIII. All the benefits offered by this society are guaranteed by the Baltimore and Ohio Railroad Co.

Appointment and duties of secretary.

32 Article XXVI. The managers will elect a secretary from the contributors who shall perform the usual duties attached to that office.

Settlement of disputes.

Article XXV. Should any difference arise between any claimants for the benefits herein set forth and the committee of management it shall be submitted to three arbitrators, one to be chosen by each party and the third by the two thus chosen, whose decision shall be final.

Contributions—when paid.

Article XXVI. All contributions due by the members of this society shall be paid in advance by being deducted from the monthly wages due them by either of the companies aforesaid, and every person signing these rules hereby assents to such deduction.

Modification, repeal, &c., of rules.

Article XXVII. None of the provisions of this constitution shall be altered, modified, or repealed, nor shall any new rule be made, except at a general meeting of the committee of management. Three months' notice must be given of any such proposed change or modification, and every such amendment, repeal of an old rule, or introduction of a new one shall be inoperative until confirmed by a two-thirds majority vote of the members of this society or by two-thirds of the committee of management at a subsequent general meeting.

33

Exhibit "B."

Baltimore & Ohio Employés' Relief Association.

Application for membership.

To the secretary of the Baltimore and Ohio Employés' Relief Association:

I, John Baugh, of Bellaire, in the county of Belmont, State of Ohio, aged 23, at present employed as a fireman in the transpt. department of the B. & O. Railroad Company, apply to be admitted a member of the Baltimore and Ohio Employés' Relief Association, hereby consenting to be bound by the rules of the association, as herein set forth, which I have read (or have had read to me), and by any other rules and regulations now recognized by said association, & also to conform to & be bound by such additional by-laws, rules, & regulations as may hereafter be adopted by its committee of management, in accordance with the provisions of its constitution. I also agree that $2.00 shall be deducted monthly in advance from the wages that are now or may hereafter become due me in order to secure to myself, or, in case of my death, to Anna Baugh, my mother, or, if there shall then be no such person, to my heirs, two times the benefits secured by said rules, by-laws, and regulations to the smallest class of contributors to its relief fund.

I certify that I am correct and temperate in my habits and have no injury or disease, constitutional or otherwise, which will tend to shorten my life; am now in good health and am able to earn a livelihood.

34 I do hereby acknowledge, consent, and agree that any untrue or fraudulent statement made by me to the medical examiner or any concealment of facts by me in this application or my suspension or expulsion from or voluntary se*r*erance of my connection with the —— Railroad Company shall forfeit my rights of membership in the above-named association and all benefits, rights, or equities arising therefrom.

In witness hereof I have signed these presents, at Bellaire, in the State of Ohio, this 1st day of September, 1884.

(Signed) JOHN BAUGH.

Witness:

(Should be an official of Co.)

(Signed) R. T. DEVRIES,
Gen'l Ag't,
Per JNO. BIGELOW.

If the person wishing to join cannot write, this form to be read over to him, signed with his mark, witnessed, and witness to sign the following certificate:

I certify that the foregoing form has been read over to the person whose mark I herewith witness.

Witness:

—— ——.

(Should be an official of Co.)

35 And afterwards, to wit, on the 10th day of November, A. D. 1886, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN BAUGH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD Co. (a Corporation), Defendant.

Demurrer.

And now comes the plaintiff and demurs to the second defense in defendant's answer in this action and for cause says that the same does not state facts sufficient to constitute a defense. 36

DANFORD & TALLMAN,
Plaintiff's Att'ys.

And afterwards, to wit, on the 3rd day of Dec., A. D. 1886, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN BAUGH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD Co., Defendant.
No. 236. Motion.

Now comes the defendant, The Baltimore and Ohio Railroad Co., and moves to quash the depositions filed on behalf of the plaintiff in this case, and for cause shows that no sufficient notice was served upon or acknowledged by the defendant of the taking of said depositions, the names of the witnesses being omitted therefrom.

Second. There is no sufficient certificate attached to said depositions.

Third. The testimony contained therein is wholly incompetent and irrelevant.

J. H. COLLINS,
Att'y for Def't.

37 And afterwards, to wit, on the 23rd day of Dec., A. D. 1887, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

In the Circuit Court of the United States for the Southern District of Ohio.

JOHN BAUGH
vs.
THE BALTIMORE AND OHIO R. R. CO. } No. 326. Cost Bond.

I hereby acknowledge myself security for costs in this case.

JOHN W. SHANNON. [SEAL.]

Taken and acknowledged before me this 22nd day of Dec., 1887.

D. H. MILLIGAN,
[SEAL.] *Deputy Clerk, Common Pleas Court.*

SOUTHERN DISTRICT OF OHIO, *ss :*

I, J. W. Shannon, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth two thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

JOHN W. SHANNON.

Sworn to and subscribed before me this 22 day of Dec., A. D. 1887.

D. H. MILLIGAN,
[SEAL.] *Dep'ty Cl'k, Common Pleas Court, Belmont County, Ohio.*

38 And afterwards, to wit, on the 24th day of January, A. D. 1888, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

In the Circuit Court of the United States for the Southern District of Ohio.

JOHN BAUGH
vs.
BALT. & OHIO R. R. CO. } No. 236. Cost Bond.

I hereby acknowledge myself security for costs in this case.

JOHN C. KINTNER. [SEAL.]

Taken and acknowledged before me this 23rd day of January, 1888.

WILLIAM B. CASH,
Clerk of Common Pleas Court. [SEAL.]

BELMONT COUNTY, OHIO:

I, John C. Kintner, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth one thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

JOHN C. KINTNER.

39 Sworn to and subscribed before me this 23 day of January, A. D. 1888.

WILLIAM B. CASH,
Clerk of Common Pleas Court, Belmont Co., Ohio. [SEAL.]

And afterwards, to wit, on the 16th day of April, A. D. 1888, the following agreement of attorneys was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Agreement of Attorneys.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN BAUGH, Plaintiff,
vs.
THE BALTIMORE AND OHIO R. R. Co., Defendant. } Agreement.

The plaintiff in the above case consents to the defendant filing an amended answer herein, copy of same to be furnished me in reasonable time by defendant.

L. DANFORD,
Att'y for Plaintiff.

And afterwards, to wit, on the 16th day of April, A. D. 1888, the following amended answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Amended Answer.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

40 JOHN BAUGH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant. }

Amended answer.

First answer. The defendant, The Baltimore and Ohio Railroad Co., answering the petition of said plaintiff and admitting its corporate organization as stated therein and admitting the statements of the petition with reference to its business and possession of a railroad and cars, &c., and admitting that plaintiff was in its employ and was injured by reason of a collision by the engine on which he was employed as a fireman and a train on defendant's road, *it* denies each and all of the other averments of the petition and says that the same are not true.

Second answer. The defendant, by way of a second answer, says that the Baltimore and Ohio Employés' Relief Association was and is a corporation duly incorporated by the act of the General Assembly of the State of Maryland entitled "An act to incorporate the Baltimore and Ohio Employés' Relief Association," approved May 3, 1882; which act of incorporation is as follows:

"An act to incorporate the Baltimore and Ohio Employés' Relief Association."

"SECTION 1. Be it enacted by the General Assembly of
41 Maryland, That John W. Garrett, William M. Clements, Samuel R. Johnson, N. E. Chapman, Andrew Anderson, David Lee, William Franklin, William H. Harrison, G. M. Serfell, Arthur Sinsel and William T. Bernard, and their successors chosen as a committee of management and a board of trustees, in the manner hereinafter provided, shall be a corporation under the name of the 'Baltimore and Ohio Employés' Relief Association.' The objects of which shall be to extend relief in case of sickness, injury, old age and death, to the employés of the Baltimore and Ohio Railroad Co. and their families and also to the employés of such other railroad companies as this association may permit to participate in its benefits, and to the families of such employés; to receive deposit on interest from said employés and their wives, and to loan them money at lawful rates of interest, in order to provide them with, or to improve homesteads and generally to promote their welfare. It shall be a condition precedent to the making of any engagements by this association for either of above-mentioned purposes, that the directors of the Baltimore & Ohio Railroad Co. shall by resolutions guarantee the faithful performance of the obligations of the association, which shall make no contracts beyond such guarantee or after the repeal of the resolution authorizing same.

The powers of relief belonging to the association shall be exercised by the committee of management consisting of ten persons; one of whom shall be the president or the president *pro tempore*, of the Baltimore and Ohio Railroad Co. four of whom shall be appointed by the president of the Baltimore and Ohio Rail-
42 road Co. and five elected annually by the members of the association.

The powers of receiving money of said employés and their wives on deposit, and making loans and all other investments of the funds of the association, shall be vested in a board of trustees, consisting of five persons, three of whom shall be appointed by the president of the Baltimore and Ohio R. R. Co., and two elected annually by those depositing in the savings fund of the association.

Elections for those members of the committee of management and the members of the board of trustees not appointed by the Baltimore and Ohio Railroad Company, shall be held at the time and place and in the manner set forth in the constitution and by-laws of the association, and any vacancies occurring in either board shall be filled in the manner provided by the constitution and by-laws of the association.

Any of the employés above mentioned, upon subscribing to the constitution and by-laws of the association, and performing all other obligations required to constitute membership in the association, shall have the privilege of voting for members of the committee of management or trustees as the case may be, either in person or by proxy.

SECTION 2. And be it enacted that this association shall have power to sue and be sued complain and defend in any court of law or equity; to make and use a common seal or seals for its board of trustees and committee of management respectively, and alter the same at pleasure to acquire by purchase gift devise or bequest or in any
43 other manner and take hold receive use employ manage sell
lease mortgage or otherwise dispose of, or in any manner not inconsistent with law, deal in property, real personal, or mixed, and situated in or out of this State, which may be necessary or proper for said corporation in carrying on its operations and generally to do every other act or thing not inconsistent with law, which may be necessary to promote the objects and purpose for which the said association is formed.

The committee of management and the board of trustees may each adopt such constitution and by-laws rules and regulations as may be deemed proper and necessary to accomplish the objects of the association, intrusted to these respective boards, that are not inconsistent with the laws of the State of Maryland and of the United States and they may from time to time alter, amend or repeal any provision of the constitution or by-laws rules or regulations. Such by-laws or constitution may prescribe the terms and conditions on which members of the association and the beneficiaries thereof shall become entitled to the benefits provided by the association.

By reason of the guarantee of the Baltimore and Ohio Railroad Company, herein provided for, no constitution, by-laws rule or regulation, nor any amendment, modification or repeal thereof shall have any force until the same shall be approved by the Baltimore and Ohio Railroad Company.

44 The Baltimore and Ohio Railraod Co. is authorized from time to time to give such aid to said association, by contributions of money or otherwise and on such terms and conditions as the president and directors may prescribe.

SECTION 3. And be it enacted, that this act shall take effect from the date of its passage, and shall be subject to amendment, modification or repeal by the legislature of this State.

Approved May 3, 1882."

And the defendant further avers and says that the directors of the said Baltimore and Ohio Railroad Co., by resolution duly and properly adopted after the passage of the act to incorporate said relief association, guananteed its faithful and true performance of the obligation of the association and constributed to the capital stock thereof the sum of $100,000.00 for the purpose of carrying out the object and purpose of the same. The said Baltimore and Ohio Employés' Relief Association was duly and properly organized by the election and appointment of officers and a system of rules and regulations adopted by the same.

On the first day of September, A. D. 1884, the plaintiff, John
Baugh, being in the employ of the defendant, The Baltimore and
Ohio Railroad Company, as a fireman in the transportation depart-
ment, made application to become a member of said Baltimore and
Ohio Employés' Relief Association, which said application was ad-
dressed to the secretary of the said Baltimore and Ohio Employés'
Relief Association, and in which the said John Baugh stated
45 that he was a resident of Bellaire, in the county of Belmont,
State of Ohio, was aged 23 years, and was employed as a fire-
man in the transportation department of the Baltimore and Ohio
Railroad Co., and that he thereby applied to be admitted a member
of the Baltimore and Ohio Employés' Relief Association, and stating
in said application that he consented to be bound by the rules of the
association as set forth in his application, and which he said he had
read, and by any other rules and regulations then recognized by said
association; also to conform to and be bound by such additional
by-laws, rules, and regulations as might thereafter be adopted by
the committee of management in accordance with the provisions of
its constitution.

And the said plaintiff also in said application agreed that two dollars should be deducted monthly in advance from the wages that were then due or might thereafter become due to him from the Baltimore and Ohio Railroad Co. in order to secure to himself, or in case of his death to Anna Baugh, his mother, or if there should be no such person to his heirs, two times the benefits secured by said rules and regulations to the smallest class of contributors to its relief fund.

Said plaintiff also certified that he was correct and temperate in
his habits, that he had no injury or disease, constitutional or other-
wise, which would tend to shorten his life, and that he was at that
time in good health and able to earn a livelihood. He further
consented and agreed that any untrue or fraudulent state-
46 ment made by him to the medical examiner or any conceal-
ment of fact by him in his application or any suspension or
expulsion from or voluntary severence of his connection with the
Baltimore and Ohio Railroad Co. should forfeit his rights of mem-
bership in said relief association, and all benefit, rights, and equities
arising therefrom. Said application was signed by the said John
Baugh, at Bellaire, in the State of Ohio, on the first day of Septem-
ber, A. D. 1884.

That thereupon the application of the said John Baugh, the plaintiff, was accepted by the relief association and a contract entered into between the said relief association and the said John Baugh and this defendant, which contract was in writing, and was composed of the constitution, rules, and regulations of the said Baltimore and Ohio Employés' Relief Association referred to in the application of the said John Baugh, and which were attached and made a part of his said application; that the said constitution, rules, and regulations at that time were and now are as follows:

"*Baltimore and Ohio Employés' Relief Association.*

Constitution.

Title of associat'n.

Article I. This society shall be known as 'the Baltimore and Ohio Employés' Relief Association.'

47 Object.

Article II. Its object shall be to provide for its members while they are disabled by accident, sickness, or by old age, and at their deaths for their families.

Surgical attenda-ce.

Article III. Such provisions shall include—

1st. Surgical attendance for its members when injured by accidents while in the discharge of duty and in the service of the Baltimore and Ohio Railroad Co., or of any other railroad Co. whose employés shall be admitted to the privilege of membership by a vote of the managers of this society, who shall contract with physicians and surgeons residing at all practicable points along the lines of the roads aforesaid for such attendance.

Allowance for temporary disablement.

2nd. There shall be paid to every contributor of the smallest (or 1st) class thus injured by accident, while totally unable to labor, fifty cents for each working day thus lost, and to contributors of higher classes larger sums, proportioned to their contributions; but after six months' disability these payments shall be reduced one-half.

Allowance for permanent disablement.

They shall not be made until certificates satisfactory to the managers have been received from the supervisor or head of department or division that the accident occurred while the 48 person injured was in the discharge of duty and in the company's service and from one of the society's surgeons that this accident had caused total disability for labor for the time specified in the certificate.

Indemnity for death from accident.

3rd. In the event of the death of a contributor occurring solely by reason of and at the time or within six months after an accident while in the discharge of duty in the service of either of the companies aforesaid—in case of a contributor of the smallest class—there shall be paid to the person designated by him in the application for membership to receive the same, or to his legal representative if there by no such person, the sum of $500, and in the case of contributors of higher classes larger sums, proportionate to their monthly contributions; but all the payments shall be conditioned upon the certification of the requirements above specified by one of the designated surgeons of the society and by the members, head of department, or other official of high authority.

Relinquishment of claims for damages.

As it is not contemplated in this scheme to give double benefits in cases of disability or death resulting from accidents the benefits herein promised shall not be payable nor paid when the contributors or any person entitled to damages because of the accident to him, whether resulting in death or not, has or makes a claim
against said company or any of the companies operating its
49 branches or divisions (including the Chicago division) until
there be first filed with the committee a release satisfactory to them, releasing said companies from such damages, signed by all persons entitled to the same.

Indemnity for sickness from ordinary causes.

4th. There shall be paid to every contributor of the smallest (or 1st) class in injury or case of sickness arising from any other cause than accident occurring in the discharge of duty in the company's service while totally unable to labor fifty cents for each working day thus lost, and to contributors of higher classes larger sums, proportionate to their contributions; but these payments shall only continue one year after the employee ceases to contribute to the relief fund, and shall not be made in cases of disablement of less than six working days' duration, and then only when certificates satisfactory to the managers have been received from a duly registered medical practitioner, corroborated by the contributor's superintendent or head of department, and likewise by a certificate from one of the association's medical examiners that sickness or injury had caused total disability for labor for the time specified in the certificate of said medical practitioner. In case the medical examiner of the association shall certify that such sickness or injury caused total disability for labor for a shorter period of time than that set forth in the certificate of the medical practi-
tioner, then the payments specified in this connection shall
50 be made only for the time stated in said certificate of such
medical examiner.

Indemnity in case of death from natural causes.

5th. In the event of the death of a contributor occurring while in the service of either of the aforesaid companies, neither by his own act, nor by the hands of justice, nor in violation of the laws of the State wherein he was injured or died, nor by such accidents as will secure relief from this society, as already provided for in this constitution, there shall be paid, in the case of each contributor in the smallest class, to the person designated in his application for membership to receive the same, or, if there be no such person, then to his legal representative, the sum of $100, and in the cases of contributors in higher classes larger sums, proportionate to their monthly contributions; conditioned, however, upon the presentation of proof satisfactory to the managers that death occurred within the requirements herein set forth.

Subscriptions.

Article IV. Participation in the benefits of this association shall be voluntary as regards officials receiving an annual compensation of over $2,000 and those whose duties are in nowise hazardous and such as to render them liable to railroad casualties. All other employés on the main stem, branches, and divisions are expected to subscribe to so much of its relief feature as relates to indemnity for injuries or death occurring while in the discharge of duty and in the company's service.

51 When employés may waive ordinary death payments.

Employés who are unmarried or who have no immediate families dependent upon them for support may waive the benefits accruing in case of death from any cause other than from injuries in the discharge of duty; in which case a reduction of twenty-five cents per month on smallest and proportionately larger reductions on other contributions will be allowed.

Contributors disabled from natural causes shall hold their right to death indemnity for one month.

Article V. When a contributor shall be disabled by sickness or accident from earning any wages, and it shall be so certified by a surgeon employed by the society, he shall, notwithstanding, be entitled to the benefits of this society for one month after the time for which his contributions have been paid, and also for a period extending from the day he resumes labor to the first subsequent payment of wages.

Nature and am't of members' contributions, first or smallest class.

Article VI. For the several benefits herein set forth, medical attendance, temporary and permanent disablement indemnity, allowance for death by accident and death from other causes, each
52 member receiving a monthly compensation of $35 and under
shall pay, in advance, a monthly contribution of $1.00 if engaged in operating trains or rolling stock, or 75 cents per month if not so engaged, which shall entitle him to the benefits above assigned to the contributors in the smallest class.

Payments by 2d class of contributors.

Those receiving over $35 and not more than $50 per month shall pay double the contributions paid by the smallest class of contributors and receive double their benefits.

Payments by 3d class of contributors.

Those receiving over $50 and not more than $75 per month shall pay three times as much as the smallest class of contributors and receive three times their benefits.

Payments by 4th class of contributors.

Those receiving over $75 and not more than $100 per month shall pay four times as much as the smallest contributors and receive four times their benefits.

Payments by 5th class of contributors.

Those receiving over $100 shall pay five times as much as the smallest contributor and receive five times their benefits.

53 Provision for reducing rates of contribution or distributing surplus.

Article VII. These rates of payments shall continue only the first year of membership, and at the end of September of every year, the managers shall make up a statement of the receipts from the members and of the payments to them, and of the future liabilities of the association to them, as ascertained by some competent person to be employed by the managers for that purpose, and the whole of the surplus thus ascertained shall be used to reduce the next year's contribution or to increase the allowance for natural deaths or shall be otherwise devoted to promoting the interests of the association in such manner and at such times as shall be deemed best by the committee of management.

Uses to which company's contributions shall be applied.

Article VIII. As the Baltimore and Ohio Railroad Company for the purpose of guaranteeing the above payments and of lessening the contributions of the members of this society, have consented to bear all the expenses necessary to the proper management of its affairs and have contributed $100,000 towards its funds the whole of the interest received from its contribution shall also be used every year to lessen the contributions of the company's employés.

Extra visitation of disabled members.

54 Article IX. The managers shall from time to time provide for the visitation of the persons on the allowance list besides that of the attending surgeon or physician and no members refusing to submit to an examination by such visitor shall be entitled to receive any benefits from the fund during the continuance of such refusal.

Payment of death liabilities.

Article X. All liabilities on account of death shall be payable within sixty days after receipt of notice of death.

Contributions—how and when collected.

Article XI. The monthly payments shall, in all cases be deducted from the wages of the members. When there are no wages no payments can be made.

Committee of Management.

Constitution of committee of management.

Article XVIII. The president of the Baltimore and Ohio Railroad Co. shall be *ex officio* a member of the committee of management, which, in addition, shall consist of four members to be appointed by the Baltimore and Ohio Railroad Company and five elected by the contributors: Provided that two members of
55 the committee of management shall be elected by those members of the association residing on the main stem and branches from among themselves; two members of the committee of management shall be elected by those members residing on the trans-Ohio divisions from among themselves, and one member of said committee shall be elected from those members residing on the Pittsburgh division and branches from among themselves.

Election for managers.

Article XIX. The first election for managers shall take place on the first Wed*ens*day after the first day of July, 1880, and until that election takes place the president of the Baltimore and Ohio Railroad Company shall designate the persons to represent the contributors in the board. Subsequent elections shall take place on the first Wedn-sday following the first day of January of every year.

Election by contributors.

Article XX. At these elections for managers each person shall be entitled to vote in proportion to his monthly contributions and shall have the right to vote by proxy.

Managers not entitled to compensation.

Article XXI. No person shall be entitled to receive any compensation or salary by reason of his service upon the committee of management.

56

Investment funds.

Article XXII. The monies belonging to the fund of this society, not wanted for immediate use, shall be invested by the managers in United States bonds, Maryland State and municipal bonds, Baltimore and Ohio Railroad bonds, stocks or other obligations, and other first-class securities.

Custody of funds.

All securities and the monies necessary to meet current expenses shall be entrusted to the official custody of the treasurer of the Baltimore and Ohio Railroad Company, to be held subject to the requisition of the committee of management.

Benefits guaranteed by B. & O. R. R. Co.

Article XXIII. All the benefits offered by this society are guaranteed by the Baltimore and Ohio Railroad Company.

Appointment and duties of secretary.

Article XXIV. The managers will elect a secretary from the contributors who shall perform the usual duties attached to that office.

Settlement of disputes.

Article XXV. Should any difference arise between any
57 claimants for the benefits herein set forth and the committee
of management it shall be submitted to three arbitrators, one to be chosen by each party and the third by the two thus chosen, whose decision shall be final.

Contributions—when paid.

Article XXVI. All the contributions due by the members of this society shall be paid in advance by being deducted from the monthly wages due them by either of the companies aforesaid, and every person signing these rules hereby assents to such deduction.

Modification, repeal, &c., of rules.

Article XXVII. None of the provisions of this constitution shall be altered, modified, or repealed, nor shall any new rule be made, except at a general meeting of the committee of management.

Three months' notice must be given of any such proposed change or modification, and every such amendment, repeal of an old rule, or introduction of a new one shall be inoperative until confirmed by a two-thirds majority vote of the members of this society or by two-thirds of the committee of management at a subsequent general meeting."

On the 28th day of Aug., A. D. 1885, the said John Baugh commenced a suit before Andrew Roeder, a justice of the peace of Pultney township, Belmont Co., Ohio, against the said Baltimore and Ohio Employés' Relief Association and the defendant herein, The Baltimore and Ohio Railroad Co., upon said contract of insurance
and for the purpose of recovering under said contract of
58 insurance the benefits to which he was entitled; that in said
suit before said justice of the peace the said John Baugh was plaintiff and this defendant and The Baltimore and Ohio Employés' Relief Association were defendants, and in his bill of particulars therein he set forth the same cause of action that is alleged in the petition herein, except that said cause of action was founded on the said contract of insurance entered into between the said plaintiff, the said Baltimore and Ohio Employés' Relief Association, and this defendant as hereinbefore set forth.

That such proceedings were had in said suit before said justice that afterwards, on the 9th day of Sept., 1885, said cause was tried before said justice of the peace and a judgment rendered therein by the said justice in favor of the plaintiff, John Baugh, and against both of the defendants therein, to wit, The Baltimore and Ohio Employés' Relief Association and The Baltimore and Ohio Railroad Co., for the sum of one hundred dollars and costs, taxed at three dollars and fifty cents, from —, and, not having been reversed or set aside in any manner, has been paid off and satisfied by this defendant, The Baltimore and Ohio Railroad Company.

And the defendant says that said plaintiff having elected to proceed under his said contract with said relief association and this defendant and having brought and prosecuted to final judgment a suit thereon, as hereinbefore set forth, and having recovered
59 a judgment thereon and received payment thereof for the same injuries which are set forth and complained of now in this suit, his action herein is barred and he cannot now pursue his remedy in this case and recover for the same cause of action contained in said suit before said justice.

J. H. COLLINS,
Att'y for Defendant.

STATE OF OHIO,
Franklin County. }

J. H. Collins, being duly sworn according to law, says that he is the attorney for the defendant corporation in this suit, and that he believes the facts stated in this answer are true.

J. H. COLLINS.

Sworn to before me and subscribed in my presence by J. H. Collins this 14th day of April, A. D. 1888.

[SEAL.] LORENZO D. HARGARTY,
Notary Public.

And afterwards, to wit, on the 7th day of May, A. D. 1888, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer.

In the Circuit Court of the U. S., Southern District of Ohio, Eastern Division.

JOHN BAUGH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD CO., Def't. }

Demurrer.

60 The plaintiff demurrs to the second answer of the def't in its amended answer, and for cause says the same does not state facts sufficient to constitute a defense.

DANFORD & TALLMAN,
Att'ys for Plaintiff.

And afterwards, to wit, on the 5th day of June, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, 146.

This cause came on to be heard at this term upon the demurrer of the plaintiff to the second defence in the answer of the defendant and was argued by counsel, and the court, upon consideration thereof, doth sustain said demurrer; and thereupon, the parties being present by their attorneys, to try the issues joined, a jury being called, came, to wit, Henry Logan, Henry Heinmiller, John Stout, Aaron Meilly, Leonard P. Jarvis, Geo. Fischer, James Poindexter, Burgess Hopkins, George Trandtner, Washington James, Thomas H. Young, and John B. Overmeyer, who were duly empaneled and sworn (well and truly to try the issues joined between the parties herein), but, the testimony not being concluded at the hour of adjournment, the court respited the jury until to-morrow morning at ten o'clock, until which time this cause is continued.

61 And afterwards, to wit, on the 6th day of June, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, page 146.

This day again came the parties, by their attorneys, and also the jurors heretofore empaneled and sworn herein, who, having heard the evidence, the arguments of counsel, and the charge of the court, upon their oaths do find the issues joined in favor of the plaintiff and assess his damages at $6,750—six thousand seven hundred and fifty dollars.

Whereupon counsel for defendant gave notice of a motion for a new trial.

62 Journal B, page 146.

Thereupon came the defendant, by its counsel, and filed its motion asking the court to direct a verdict in favor of the defendant in this suit, which, upon argument and full consideration, the court overruled; to which ruling of the court the defendant, by its counsel, excepted and now presents to the court this its bill of exceptions taken on the trial of said cause, which is allowed, signed, and sealed by the court, and ordered to be made a part of the record of this case.

And afterwards, to wit, on the 7th day of June, A. D. 1888, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN BAUGH, Plaintiff, *vs.* THE BALTIMORE AND OHIO R. R. Co., Defendant.	Motion for a New Trial.

And now comes the defendant, The Baltimore & Ohio R. R. Co., and moves the court for a new trial in this case for causes following, to wit:

1st. The court erred in permitting testimony to go to the jury which was objected to by the defendant.

2nd. The court erred in overruling the motion of the defendant asking the court to direct a verdict in its favor and for a nonsuit.

3rd. The court erred in its charge to the jury.

4th. The verdict is against the weight of evidence and is contrary to law. Whereupon the said defendant asks that said verdict be set aside and that it be granted a new trial of this case.

J. H. COLLINS,
Att'y for Defendant.

63 And afterwards, to wit, on the 22nd day of October, A. D. 1888, an entry was made upon the journal of said court, clothed in t-e words and figures following, to wit:

Journal B, 162.

This cause came on to be further heard at this term upon the motion of counsel for defendant for a new trial and was argued by counsel, whereupon, upon consideration thereof, the court doth overrule said motion; and counsel for plaintiff moving for judgment on the verdict of the jury heretofore rendered herein, it is thereupon ordered, adjudged, and decreed that said plaintiff recover from said defendant the sum of six thousand seven hundred and fifty ($6,750) dollars, with interest from the 6th day of June, 1888, together with his costs in this behalf expended, taxed at $——, and execution is awarded therefor, and upon application of defendant it is ordered that execution be stayed for thirty days to allow defendant to prepare and present its bill of exceptions.

And afterwards, to wit, on the 22nd day of October, A. D. 1888 an entey was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, page 162.

In this case a bill of exceptions is presented by the counsel for the defendant, signed, sealed, allowed, and made part of the record, and

64 & 65 the court allows a writ of error to the supreme court, with stay of execution, upon the filing of a supersedeas bond in the sum of $14,000, with good and sufficient securities, to be approved by the clerk, within 20 days from this date.

And afterwards, to wit, on the 4th day of August, A. D. 1888, the following bill of exceptions was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

JOHN BAUGH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Bill of Exceptions.

Be it remembered that on the trial of this cause at the June term of the said circuit court of the United States for the southern district of Ohio, eastern division, for the year 1888, before the Honorable George R. Sage, judge of said court, the said John Baugh, plaintiff, to maintain the issues on his part, gave in evidence to the jury the testimony hereinafter fully set out, and which was all the testimony offered or given by the said plaintiff upon the trail of the said cause, no testimony whatever being offered by the said defendant.

(Index to bill of exceptions omitted here in printing. See general index.)

66 *Plaintiff's Testimony.*

C. D. MCDONALD, a witness in behalf of plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. TALLMAN:

Q. Where do you reside?
A. Newark, Ohio.
Q. What is your occupation?
A. Conductor.
Q. For what road?
A. Baltimore and Ohio.
Q. Are you now in the employ of the Baltimore and Ohio?
A. Yes, sir.
Q. How long have you been in its employ?
A. About 21 years.
Q. What were you doing on the 4th day of May, 1885?
A. Conductor.
Q. On what train?

A. Passenger train, running west.

Q. What was the number of that train?

A. 14, I believe.

Q. What time did you leave Bellaire?

A. I cannot give you the exact time.

Q. Did that train have a collision with a helper on that day?

A. Yes, sir.

67 Q. Whereabouts?

A. About half or three-quarters of a mile east of Belmont or two miles west of Lewis' Mills.

Q. Did it occur on a curve of the track?

A. Yes, sir.

Q. State whether your passenger train was running on time or not.

A. On schedule time; yes, sir. We had no orders that day.

Q. It was running on schedule time?

A. On schedule time.

COURT:

Q. How far was this east of Belmont?

A. Half or three-quarters of a mile.

Mr. TALLMAN:

Q. An- about two miles west of Lewis' Mills?

A. 2.

Q. After you left Bellaire what was the last telegraph station that you passed before the accident?

A. Lewis' Mills.

Q. What other telegraph stations are there between Bellaire and the place of the accident?

A. St. Clairsville Junction. That is the first.

Q. And the next is Lewis' Mills?

A. Yes, sir.

Q. How many miles is that from there?

A. 15.

Q. And the next is what?

A. Barnesville.

Q. That is beyond the place of the collision?

68 A. Yes, sir.

Q. What is this helper—what is it used for?

A. Helping trains up to the top of the grade.

Q. What kind of trains?

A. Freight trains.

Q. These freight trains run on schedule time, on the regular time-card?

A. Yes, sir.

Q. In going west or helping out these freight trains, does the helper run on schedule time with the freight?

A. They are coupled onto the freight train.

Q. How far does the helper go west with the freight train?

A. About 20 miles.

Q. Whereabouts is the turn-table?
A. About a mile west of Burr's Mills—what we call Tunnel Hill.
Q. That is about how far from Bellaire?
A. About 20 miles—19 and a half to 20 miles.
Q. About how far from Lewis' Mills?
A. About 8 or 9 miles.
Q. Now, Lewis' Mills was the last telegraph station that was passed until they got to the turn-table?
A. Yes, sir.
Q. There is no telegraph station at the turn-table?
A. No, sir.
Q. None at Belmont or Lewis Mills?
A. No—yes, sir; at Lewis' Mills.
Q. Any at Burr's Mills?
69 A. No, sir.
Q. What does the helper do when it gets to the turn-table?
A. Cuts loose from the train, drops back to the turn-table, turns the engine, and goes back to Bellaire.
Q. How does the helper get back to Bellaire?

Objection by defendant's counsel to foregoing question.

Court: I suppose the general situation may be explained, but, of course, what the helpers on other occasions did is not material, except that it is proper to show what is the general lay of the premises.

Q. In other words, does it go back to Bellaire on schedule time or is there any schedule time on the time-cards?
A. No time-cards for helpers.

Court: The time-card is the best evidence of that.

Mr. Tallman:

Q. How does it run back to Bellaire, as it is called in railroad parlance?

A. Court: Do you mean to inquire if there is a single track or double track?
Mr. Collins: It is a single track; no question about that, except sidings.

Mr. Tallman:

Q. Not running on schedule time and going back, how does it get back?

Court: Is this witness knows what was the rule of running helpers, he can state it, for this reason: If the helper was running
70 contrary to rule, that is proper evidence, as it would be proper for the defendant to show that it was running according to rule.

Mr. TALLMAN:

Q. The question is, how does this helper get back to Bellaire? Having no schedule time, how does it run back?

A. That one helper?

Q. That or any helpers.

A. I do not know what orders they had at all.

Q. I am not asking as to any special telegraphic orders; but in the absence of telegraphic orders how do they get back, do they return "wild"?

A. Yes, sir.

Q. What is the meaning of that phrase "return wild," if you know?

A. The meaning of "wild" is to keep off the time of all regular schedule trains.

Q. How many tracks are there from Belmont to this turn-table?

A. One.

Q. Let me see if I understand you. The phrase, then, would mean for the helpers to run back to Bellaire on the main track, keeping out of the way of all regular schedule trains going both ways?

A. Except they had other orders.

Q. Unless they had some special orders?

A. Yes, sir.

Q. Had this train any orders that morning that you know of?

71 A. Not against me.

Mr. COLLINS: You don't know anything about it, do you?

Mr. TALLMAN:

Q. If they had had any orders against you, you would have got orders at Lewis' Mills——

COURT: Your business is to ask him what orders he had.

WITNESS: I say that I had no orders.

Mr. TALLMAN:

Q. You had no special telegraphic orders at Lewis' Mills? You were going west on the time-card on the schedule time?

A. Yes, sir.

Q. What time did this accident happen?

A. I cannot give the exact figures, because I do not recollect anything of the kind now.

Q. Is this the time-card that was in force on May 4th, 1885?

A. Yes, sir.

Q. What was the number of your passenger train?

A. 14, I believe.

Q. What was its schedule time at Lewis' Mills on that — ?

A. Eight twenty.

COURT: A. m. or p. m.?

A. A. m.

Mr. Tallman:

Q. About what time was this accident—were you on time or behind time?

A. I think we were a few minutes late. I think 3 or 4 minutes late, maybe. I think the accident happened about 25, 26, or 28; somewheres along about that time. I could not say just the exact time.

72 Q. You had the right to the road at that time?

Mr. Collins: The rule will show.

Mr. Tallman: Does the schedule show that you had the right of way?

Court: If that is a matter of rule in print, the rule is the best evidence.

Mr. Tallman: Look at the schedule there.

Court: You can offer the schedule. It does not make it any better to ask the witness to look at the schedule and answer from that. His oral testimony is not competent if it is in the printed rules. Have you the rules marked?

Mr. Tallman: Some of them.

Mr. Tallman:

Q. What time were you due at Belmont?

A. 8.28.

Q. And the accident happened at 8.25 or '6?

A. Somewhere along about there—between 25 or 30.

Q. You know Mr. Baugh, do you?

A. Yes, sir.

Q. How long have you known him?

A. Oh, I have known him ever since he was a boy.

Q. What was he doing at that time?

A. He was firing the helper—fired on the helper.

Q. Who was the engineer of the helper?

A. A man by name of Hite, I believe.

Q. How long had you known Robert Hite?

A. I never knew him before that day.

73 Q. Mr. Baugh was hurt in that collision, was he?

A. Yes, sir.

Cross-examination by Mr. Collins:

Q. Mr. McDonald, when you speak of "running wild" I will ask you if you do not mean that to run wild the engineer or the parties in charge of the engine would have to have orders.

A. Yes, sir.

Q. If an engine helping a train up to Burr's Mills, if it gets in there and has no orders, it is in a pocket and stays there until somebody orders it out?

A. They have to get out by flagging or some other way.

Q. It has no right to go out on the main track unless it has orders?

A. To protect themselves.

Mr. TALLMAN:

Q. Suppose they do get in a pocket at the turn-table, there is no telegraphic office there?

A. No, sir.

Q. What is the nearest telegraphic station to the turn-table?

A. Lewis' Mills.

Q. And that is eight or nine miles from the turn-table?

A. Yes, sir.

Mr. COLLINS:

74 Q. This helper goes out of Bellaire as a part of the train?

A. Yes, sir.

Q. And it is a part of the schedule of that train until it gets to the top of the hill?

A. Yes, sir.

Q. And without orders, right there it stays?

A. Yes, sir.

Mr. TALLMAN:

Q. Look at the time-card and state if there is any provision for or any schedule time given for the return of this helper.

A. No schedule time, sir.

Q. Where trains do not run on schedule time what are they called?

A. Wild trains.

COURT:

Q. Let me ask a question. You say the collision occurred on a curve. How long before the locomotives came together—came in collision—were they in sight of each other?

A. Well, I never walked over the ground, but they have not very much right.

Q. Is there a cut at the curve?

A. On one side.

75 Q. Which side?

A. The inside.

Q. How deep is that?

A. O, it runs off about 10 or 15 feet; slants back—runs up till it comes to a pretty good hill.

Q. State whether it is high enough to obstruct the view of an approaching train.

A. There is woods that obstructs the view.

Q. Did you see the helper before the collision actually occurred?

A. No, sir.

Q. Was there any danger signal?

A. No, sir.

Q. At what rate *or* speed were you running?

A. I expect that we were making probably 25 or 30 miles an hour.

76 JOHN BAUGH, plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. DANFORD:

Q. Mr. Baugh, are you the plaintiff in this case?
A. Yes, sir.
Q. How old are you?
A. 27 next birthday.
COURT: When is that?
A. 29th of June.

Mr. DANFORD:

Q. Where were you raised?
A. Zanesville, Ohio.
Q. Did you ever live in Bellaire?
A. Yes, sir; for the last eight or nine years.
Q. Where did you live about May, 1885?
A. Bellaire.
Q. What were you employed at?
A. I was firing an engine on the B. & O. railroad.
Q. How long had you been firing for that company?
A. I cannot say exactly how long.
Q. As near as you can come at it.
A. I would say a year.
Q. What had you been working at when you went on the train?
A. Blacksmithing.
Q. For the company?
A. Yes, sir.
Q. What was your father employed at?
77 A. Yardmaster.
Q. For this company?
A. Yes, sir.
Q. At Bellaire?
A. Yes, sir.

Q. Now, Mr. Baugh, how long had you been running on this helper or on a helper?

A. I cannot say exactly how long; probably two months.

Q. Who had you been firing for?

A. I had been firing for Joseph Beatty and Tom Burke, and then they put me on with this man Hite.

Q. How long had you been running with Hite?

A. I had been running, I suppose, two weeks with him, probably.

Q. Had you known him before you commenced running with him?

A. Yes, sir.
Q. What was he doing?
A. Running an engine.

Q. On the morning of this accident, what time did you leave Bellaire?

A. I don't know what time we left.

Q. Early in the morning?

A. Yes, sir.

Q. Before or after daylight?

A. Well, it was just about daylight.

78 Q. What train did you go out with?

A. First section — 92.

Q. You hitched onto the rear of that train?

A. No, sir; we were in the middle.

Q. How far did you go with 92, first section?

A. To the turn-table.

Q. Where is that?

A. Top of the grade, about 20 miles from Bellaire.

Q. What happened there?

A. We turned our engine and came back.

Q. How far back did you come?

A. Come back to Burr's Mills.

Q. Now, Mr. Baugh, do you know of any orders that was received that morning by your train?

A. Yes, sir.

Q. What do you know of?

A. All I know is an order thrown off while we were at Burr's Mills, and I gave it to the engineer, and he told me to let him out; that we would go.

Q. What was that order?

Objection by defendant's counsel.

A. At same time? I do not know.

Q. Do you know what it was?

A. No, sir.

Q. What happened immediately after you gave your engineer that order?

A. He told me to let him out.

79 Objection by defendant's counsel.

Q. What did happen immediately after you gave that order to the engineer?

A. We started to go.

Q. Who opened the switch?

A. I did it.

Q. What did you do then?

A. Shut the switch and got on the engine.

Q. Which side of the engine? What did you do first when you got on it?

A. Commenced fixing the fire.

Q. What next?

A. Then I got up and sat down on my side of the cab.

Q. Which side did you sit on?

A. Left side.

Q. You may tell what took place.

A. Well, we come on down the road until we met this passenger train.

Q. Where did you meet it?

A. Met it between Belmont and Lewis'.

Q. Did you pass Belmont? Belmont is between Lewis' Mills and Burr's?

A. Yes, sir.

Q. You may tell the jury how you met this passenger train—what kind of a place.

A. It was right on a curve, about the center of the reverse curve,
and it was very hard to see an engine ahead of you very far,
80 and I seen them coming and I hallooed to the engineer
that there was a train coming, and I started to jump, and he
did not do anything; he just stood there; he was standing up.
That is all I can remember about it.

Q. What were you doing when you first saw the engine or the train coming?

A. I was sitting looking out.

Q. How near was the passenger train to you when you first saw it?

A. About two cars' lengths, I should think.

Q. Could you not have seen it sooner?

A. No, sir.

Q. What obstruction?

A. On the reverse curve; could not see it.

Q. What did you do as soon as you saw the engine?

A. I hallooed to the engineer and I started to come down the steps when they fit.

Q. Have you any further recollection about that?

A. No, sir; not for 2 or 3 days, anyhow.

Q. Had you a time-card?

A. No, sir.

Q. Did you keep—had you a watch?

A. No, sir.

Q. Do you know what time it was when you started out of the switch at Burr's?

A. No, sir.

Q. Did you know then what time of day it was?

A. No, sir.

81 Q. Did you pay any attention to that at all?

A. No; I did not. It was not my business to pay attention.

Q. Well, I was going to ask you was that any part of your duty?

A. No, sir.

Q. Whose direction were you under?

A. Under my engineer's.

Q. Did you receive any orders as you went west that morning at Lewis' Mills?

A. I don't know.

Q. On your helper, who received the orders?

A. The engineer did. He received all the orders.

Q. When you left Lewis' Mills you passed Belmont. Was there any orders thrown you there or were you notified in any way of anything?

A. No, sir.

Q. Mr. Baugh, how were you injured in that collision?

A. I had my arm taken off and my right limb all mashed up.

Q. The right leg?

A. Yes, sir; and I am a cripple in *to* to-day.

Q. What is the condition of the right leg?

A. It is crooked, and pieces of flesh fell out.

Q. Does it trouble you in damp weather?

A. Yes, sir; when it is damp weather it makes me lame.

Q. How long were you confined to the house?

82 A. About three months, I think.

Q. What surgeon or physician waited on you?

A. Dr. Kurtz.

Q. The surgeon of the company, is he?

A. Yes, sir.

Q. How long had you been in the employ of the company altogether, at all kinds of business?

Q. I suppose about a year; never kept account of it.

Q. At Bellaire?

A. Yes, sir.

Q. Do you know any other business, trade, or profession?

A. I was a horseshoer and blacksmith by trade.

Q. Your right arm is off near the shoulder?

A. Yes, sir; three inches from the shoulder.

Q. Have you any trouble from that?

A. Not lately, I have not. It thumps and pains once in a while.

Cross-examination by Mr. COLLINS:

Q. Mr. Baugh, how long did you say you had been in the service of the Baltimore and Ohio Company?

A. I think I was about a year. I am not positive.

Q. What were you doing during that time?

A. I worked in the blacksmith shop, helped the boiler-makers awhile, and fired a while.

Q. How long had you been firing?

A. I do not know exactly; was firing on the hill, I think, two months.

Q. Did you not commence firing in September, 1884?

83 A. I do not know whether I did or not.

Q. You had a certificate in the Baltimore and Ohio Relief Association as mechanic in the first place?

A. Yes, sir.

Q. And then you went to firing and took a certificate as a fireman; is not that dated in Sept., 1884?

A. I fired in the yard awhile before I went on the road.

Q. I am asking you how long you were fireing?

A. I do not know the date exactly.

Q. You had been firing for several months before that?

A. Yes, sir.

Q. How long had you been firing on the helper?

A. I think about two months.

Q. Who did you run with first?

A. I run with Tom Burke, I think, first.

Q. How long did you run with him?

A. I don't know exactly.

Q. Who did you run with next?

A. Joe Beatty.

Q. Tom Burke was an engineer?

A. Yes, sir.

Q. Who did you run with next?

A. Joe Beatty.

Q. Then who next?

A. Then John Krebbs. I fired several trips with him.

Q. Was that on the helper?

A. Yes, sir.

84 Q. Then who?

A. Then this man Hite.

Q. What became of Burke; what did he go to doing when he quit running an engine?

A. When he quit running an engine?

Q. When he quit running the helper, what did he do?

A. They had him employed down there as watchman, I think, in Bellaire.

Q. Now, didn't you commence to run on this engine in the fall of 1884, about the time that you took out this policy as a fireman?

A. I commenced in the yard; I would work in the yard off and on, but they put me back in the shops.

Q. When did you first run out on the road as fireman on the helper?

A. I cannot tell you.

Q. Was it not in the fall of 1884?

A. It might have been; I don't know.

Q. If it was in the fall, then during that winter and spring you ran with the different engineers that you have named—Burke, Krebbs, Beatty, and so on?

A. Yes, sir.

Q. How long did you say you had been running with Hite?

A. Couple of weeks.

Q. Was it not six weeks?

A. It might have been.

Q. Was it not about six weeks that he had been running when this accident occurred?

A. I don't know.

85 Q. What makes you put it at two weeks if you don't know?

A. I just guessed at it; I don't know how long. I had *had* not run with him all the time.

Q. Who else ran with him?

A. There was some other man run with him, of course, and they put me on—put him off and put me on. He could not keep the engine hot, they said.

Q. How many helpers do they run out of Bellaire?

A. Four at that time, I think.

Q. How many trips a day were you in the habit of making?

A. A day and a half—one day, probably——

Q. How many trips were you required to make for a day?

A. 2 trips for a day.

Q. And you and Hite were together all the time on the *a*ngine while you were with him?

A. Yes, sir.

Q. You had become very familiar with the road in the time you had been running on the helper out to the top of the grade, hadn't you?

A. I knew where they were at when they would stop.

Q. You knew you had to run out to the top of the grade and get back? You knew the practice of running back wild?

A. I knew that we had to get back, and knew that we had to go in side tracks for trains.

Q. You knew that you had to help these trains out and go back without any reference to schedule time?

A. Yes, sir.

86 Q. Didn't you know that you had to get orders at Lewis' Mills?

Q. I knew we always did get orders at Lewis' Mills.

Q. And didn't you see them, too?

A. No, sir.

Q. And didn't you see them that day?

A. No, sir.

Q. Didn't you ever see them?

A. Oh, yes.

Q. You were in the habit of seeing them?

A. With other engineers.

Q. Did you see them with Hite?

A. Whenever he would not offer them I would not see them. I would not ask him.

Q. Will you explain the term "sneaking back"? What do you mean when you say the helper sneaked back?

A. She would dodge in side tracks to miss trains.

Q. Running back without any orders?

A. Yes, sir.

Q. When you would get out to the top of the grade and you did not have any orders how would you get them—how would you fix it then?

A. We would come down to Lewis' Mills—Burr's Mills—that morning.

Q. You did not have any orders that morning?

A. I do not know whether we had orders or not.

Q. You knew that you could not have orders against any other section of '92, didn't you?

87 A. We came back to Lewis' Mills to wait on 92.

Q. What made you do that?

A. I don't know.

Q. Had you been in the habit of doing that?

A. No, sir.

Q. How did it happen that you did it that morning?

A. I do not know. I was not running the engine.

Q. Who wr*i*te the order up at the top of the grade there for Mr. Hite to run back; there was no telegraph office there?

A. No, sir.

Q. Well, who wrote the order for Mr. Hite to run back to Burr's Mills?

A. I don't know anything about that order.

Q. Well, who wrote the order on that morning for Mr. Hite to go back to Burr's Mills?

A. I don't know who wrote the orders to go back there.

Q. And did you go back?

A. Why, we just pulled out and run back.

Q. Do you remember of writing any orders yourself that morning?

A. I remember of writing an order, when laying in the side track, to flag down. He told me to do it.

Q. What was that?

A. He says, "If them fellows don't come before this other passenger train coming east was due that we would flag down;" and he told me how to write the order and I wrote it, and this train come before this train coming east was due.

Q. That was an order purporting to be from the train-dispatcher? 88

A. No, sir.

Q. Who was it from?

A. From the engineer to flag down on the passenger train.

Q. Was it not an order purporting to be from the train-dispatcher to flag down on the other train?

A. No, sir.

Q. Didn't you write the order that morning and didn't you sign the train-dispatcher's name to it; didn't you sign "T. F."?

A. No, sir.

Q. I will ask you if you did not direct your father to *to* write a letter—your father is W. J. Baugh?

A. Yes, sir.

Q. I will ask you if you*r* did not instruct him while you were sick, on May 8, 1885, to w*ir*te a letter and if you did not say to him in that letter "that he says he wrote an order to flag against 92 at Burr's Mills on the east-bound passenger train." Didn't you have your father write that to Mr. Fitzgerald?

A. No, sir.

Q. You did write the order?

A. I wrote an*d* order, yes, sir; and signed my engineer's name to it.

Q. Had the engineer any authority to run his own engine?

A. This kind of an order was for me to get on the engine to show the engineer that we would follow him *him* down.

89 Q. You wrote that kind of an order?

A. Yes, sir.

Q. Did you ever do it before?

A. No, sir; I have seen other engineers do it.

Q. Does the engineer have to write that kind of an order to flag the train?

A. I don't know. That's what he told me to write.

Q. And you w*or*te it?

A. Yes, sir.

Q. Did you ever do it before?

A. No, sir; I have seen other engineers do it.

Q. You have seen other engineers do it and knew it was the custom?

A. We never had to do it very often.

Q. Didn't you start in to teach Mr. Hite how that was done?

A. No, sir.

Q. Didn't you tell Mr. Hite that you were familiar with that and didn't you tell him how the engineers when they got into a pocket were in the habit of getting out?

A. He asked me if I ever wrote any orders.

Q. Tell us about that.

A. He says, "We will flag down." He says, "You will have to make out an order," and I says, "All right," and he says for me to do it.

Q. And then you did it?

A. Yes, sir.

90 Q. And that was the order that you started to run on?

A. Yes, sir.

Q. The order that you w*or*te for the engineer; that is the order that you started to run on?

A. Yes, sir.

Q. Didn't you explain to him at that time how the engineers were in the habit of doing that?

A. Yes, sir.

Q. You told him the process by which engineers got out of this place when they got into it?

A. Yes, sir.

Q. How full an explanation did you give of that?

A. I cannot say.

Q. Anyhow, you told him the process by which they got out, and then he told you to write this order?

A. He told me in the first place, and then I told him about what I knew about it.

Q. He told you in the first place to write an order and then you told him what you knew about it?

A. Yes, sir.

Q. Mr. Baugh, when you got up there to Burr's Mills to the turntable, how would you get back to Bellaire?

A. Run back.

Q. How? You had no right to the road; you had no right to turn a wheel on the main track without schedule or orders.

A. I had no right to turn a wheel in the first place.

Q. You know that the engine has no right to the track at all unless it has schedule orders. You know that, don't you?

91 A. Yes, sir.

Q. Now, that was one of the things that you learned while you were firing, was it not? You learned that after you went into the service of the company that an engine has no right to turn a wheel on the main track unless it has a schedule time or has orders.

A. Yes, sir.

Q. Now, Mr. Baugh, when you got up to Burr's Mills, to that turn-table, just explain to the jury the process by which that engine would get back to Bellaire.

A. We had all the trains on the road to contend with, and we had to run inside tracks when coming down to keep out of the way of them.

Q. When did you first learn the fact that you had to keep out of the way—out of the way of what trains?

A. All the trains that was expected.

Q. The schedule trains, would it not be?

A. I reckon.

Q. What was the process—what right had you to go back after you got to Burr's Mills or the turn-table? You had no right to the track at all unless you had orders, had you?

A. No, sir; didn't have no right without orders.

Q. And you proposed to get a right to the track by writing an order which you have said you did write?

A. I was going to flag on the engine. I did not want to run them on my orders.

92 Q. You had been running the length of time, whatever it was; you knew the time of this local train out of Bellaire?

A. No, sir.

Q. You were in the habit of meeting it?

A. I did not know what time they left.

Q. You knew where you met them always?

A. No, sir; we would not meet them perhaps once in a month. We would not meet them once a month sometimes.

Q. You knew the time of the local train?

A. No, sir.

Q. You knew there was a local train on the road running out of Bellaire in the morning?

A. Yes, sir.

Q. You knew when you were running—knew where you met them?

A. I did not know anything about it that time.

Q. Is it not a part of your duty to learn these things? I want to know if you did not know that there was a local train and has been for the last ten years running out of Bellaire about the same time—about the same hour and the same minute.

A. No, indeed; I did not.

Q. And you were at work at—in the shops and yard and did not know anything about it?

A. No, sir; I did not.

Q. You entirely overlooked that fact?

No answer.

93 Redirect examination by Mr. Danford:

Q. You were on a side track at Burr's Mills. What trains were you waiting for there? Was there a train coming east that was about due?

A. Yes, sir.

Q. What number was it?

A. No. 15.

Q. What was it?

A. Accommodation train.

Q. You proposed to write an order and give it to the engineer of that train to flag you, so that you might follow on his time to Bellaire?

A. Yes, sir.

Q. And that is what was talked about and that is what was written there?

A. Yes, sir.

Q. Would that have been a safe way to come down and the usual way—on the time of another train, if they took the precaution of having it flagged?

A. Yes, sir.

Q. Was that order delivered to any engineer?

A. No, sir.

Q. You left there, in fact, before 15 got to Burr's?

A. Yes, sir.

Q. And left there after the coming west of the second section of 92 or 32, whichever it was?

A. Yes, sir.

Q. When that section came up you pulled right out and started down the road?

94 A. Yes, sir.

Court:

Q. How long after the train which you came in collision with before another train from the east would be due that morning?

A. I cannot say.

Q. About how long?

A. About 2 hours, I suppose.

Q. Was that a freight train or a passenger train?

A. Passenger train.

Q. I mean the next train that would be due after that.

A. It would be a passenger train.

Q. You say you did not know the schedule time of this train with which you came in collision?

A. No, sir.

Q. Did you know that there was a local train coming out about that time?

A. I knew there was a local train on the road some place.

Q. Between you and Bellaire?

A. Yes, sir.

Q. I wish you would explain to the jury what you mean by flagging. You say your intention was to flag down to Bellaire. How is that done?

A. We make out an order and give it to the engineer on the train we want to follow; sign the engineer's name; and I went with this flag on the train, and *and* our engine followed behind until we met another train, and then we would side-track there and pass.

95 Q. That is, you would keep far enough ahead so that if you met a train you would signal it and stop the train?

A. I would go right on the train that had the right of way of the track and our engine followed after.

Q. Then I do not understand. You say you made out an order to flag your way down and then you got on the locomotive and started.

A. The train came that we expected before this train going east was due.

Mr. TALLMAN: The order was never delivered at all.

WILLIAM J. BAUGH, a witness in behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. TALLMAN:

Q. Where do you reside?

A. Bellaire, Ohio.

Q. You are the father of the plaintiff in this case?

A. Yes, sir.

Q. What is your business, or has been your business?

A. The last 3 years I have been keeping a boarding-house.

Q. What did you do prior to that time?

A. I was yardmaster of the B. & O. railroad, in Bellaire, at night.

96 Q. What were you at the time of this accident, in May, 1885?

A. Yardmaster at night.

Q. How long had you been yardmaster?

A. Well, I cannot just exactly state the time. I think about a year—perhaps more than that. I had been employed before that as assistant yardmaster in daytime.

Q. How long had you been in the service of the B. & O.?

A. I was running conductor of the Central Ohio division at the time the B. & O. railroad took the Central Ohio railroad.

Q. How long had you been engaged in railroading?

A. Off and on altogether in the neighborhood of 20 years—not altogether with the B. & O. I was on several other roads.

Q. Mr. Baugh, did you see that time-card there—what is that?

A. It is the time-card of the Baltimore and Ohio R. R.

Q. When did that schedule go into effect?
A. Sunday, May 3, 1885, 12.30 p. m.
Q. That was the Sunday before this accident?
A. Yes, sir; the day before.
Q. They had a different time-card prior to that time?
A. Yes, sir.
Q. That was a change of time?
A. Yes, sir.

97 Q. What is done with these time-cards, if you know? To whom were they delivered?
A. Well, the general yardmaster——

Mr. COLLINS: The rules of the company are in writing.

Mr. TALLMAN:

Q. Did you have any of these time-cards for distribution and what were your instructions as to whom they were to be delivered?

Objection by counsel for defendant.

Mr. COLLINS:

Q. Were your instructions in writing?
A. No, sir.
Q. Who were they from?
A. The general yardmaster—my superior.

Mr. TALLMAN:

Q. What did you do with the time-cards that were delivered to you for distribution?

A. I asked each conductor and engineer, as the time came for leaving, if each one had a copy, and, if not, I gave them a copy.

Q. Who gave them to you?
A. The general yardmaster—Randolph.
Q. He was the general yardmaster?
A. Yes, sir.
Q. Was he your superior?
A. Yes, sir.

Q. What were his instructions as to whom you were to give them, of any?

A. I was to give none to any, only engineers and conductors.
Q. Did you have instructions to give them to firemen?
A. I had instructions not to give them to firemen and brakemen.

98 Q. When did you distribute these time-cards?

A. Just as the freight trains would back up to leave if they came to the office to ask for orders I would ask them if they had a time-card, and, if not, I would deliver them.

Q. Now, Mr. Baugh, does that time-card show the number of freight and passenger trains that are west bound and east bound on that day—May 4th?

A. No, sir; not all together. It shows the time of each train, but sometimes they run two or three trains on one schedule time—say, for instance, a train left there at ten o'clock in the morning, there would perhaps be three sections to run on that time and the same way coming east.

Q. You remember the day of the collision, do you?

A. Yes, sir.

Q. Do you know what time the helper went out?

A. Well, I think it went out some time close to daylight; recollect that day there was a fire at the B., Z. & C. round-house and some of the boys was at the fire and delayed the train a little.

Q. How many sections of 92 that morning?

A. I think two. I won't be certain. I think 2. I know that I had called these men—had these men called—to go out on 20 and the pump would not work, so I run her in the side track and I cannot say distinctly now whether I run that 20 or not. It seems to me that I held her until 92's time, consequently there would
99 be two 92's.

Q. Do you know how the helpers are run there usually?

A. Yes, sir.

Q. Going west, they would go on the schedule time of the train that they help?

A. Going west, at the time I was yardmaster, they would couple in about 4 or 5 cars from the front end of the train and they were started the same as that train until they got to where they cut loose from the train.

Q. When they got loose from the train how did they go back?

A. When they turned at the turn-table. When coming up they stopped at Lewis' Mills and there they got an order.

Objection by defendant's counsel.

Witness: I have been a conductor on a helper. After this accident occurred they put conductors on.

Objection overruled.

Q. You may state how these helpers are managed and run.

A. When they start out they receive orders just the same as the conductor and engineer of the regular train. They get a copy of the same order that the conductor and engineer get when they leave Bellaire. If they come to Quincy, the first telegraph station—if they are flagged there for orders—they get a copy there of the orders, while at Lewis' Mills they get an order from the train-dispatcher to run to Tunnel Hill and return to Bellaire wild. That is the orders that they receive.

Q. That is universal?

100 A. That is; yes, sir. I went several times as conductor after this accident and received the orders myself.

Q. What does the phrase "returning wild" mean?

A. It means that you will—running down to Burr's Mills—suppose that a train was due *they* they were waiting for——

Court: State what you know.

A. They go in the side track and wait until the trains comes and then they look at the schedule and if there is no other train due at the next station below or none to follow them they pull out and run to the next station and so on until they get to Bellaire. At Lewis' Mills they can get orders for any train from the train-dispatcher to run to Bellaire.

Q. They have to watch the schedule and keep out of the way of all regular trains?

A. Yes, sir.

Q. And they can get no telegraphic orders on their return until they reach Lewis' Mills?

A. No, sir; not unless some train brings them orders.

Q. Mr. Baugh, do you know Robert Hite?

A. Yes, sir.

Q. How long have you known him?

A. Well, I don't know just exactly how long, only a short time before he got to running the helper there. He was running a road engine, I believe, over the road, but I think at the time he was returning from a visit when he was put on the helper. I was not much acquainted with him any time at all.

101 Q. Do you know of any violations of the rules of running trains by him while at Bellaire?

Objection by defendant's counsel. Objection sustained.

Q. Mr. Baugh, how long had John Baugh been on the road, if you know?

A. I could not say exactly; I think in the neighborhood of a year—that is, in the employ of the company.

Q. What was he engaged in at first?

A. At first he was working in the shop—boiler shop or blacksmith shop.

Q. What time did he commence to fire?

A. I think along about the latter part of 1884.

Q. What did he do at firing in the first place?

A. Fired in the yard.

Q. How long had he been running on the road?

A. I do not think he had been on the road more that a month. I could not say for sure, but I think about a month.

Q. Now, was there any certain time for his helping out trains?

A. No. The helpers run first in, first out. When it comes his turn to go in the morning he is sent out in the morning. He goes on the different runs he is called for.

Q. Going out sometimes in the morning and sometimes in the evenings?

102 A. In the morning, noon, evening, and through the night.

Q. He would go on all these trips?

A. Any one that came his turn to go he would go.

Q. He did not run, then, on any regular trip?

A. Oh, no.

Q. From the time schedule there I wish you would state to me what numbers of trains there was west-bound on May 4th, 1885.

Time schedule offered in evidence by counsel for plaintiff.

COURT: It is not necessary to read all that. You may designate the parts to which you desire to call attention, and counsel for defendant may do likewise.

Cross-examination by Mr. COLLINS:

Q. Now, with reference to what you say as to the habit of these helpers getting back, you speak simply of what occurred to you when you run out?

A. Yes, sir; and I saw an order a few days ago from one of the helpers.

Q. What you know about that is simply what you knew when you run out from Bellaire?

A. Yes, sir.

Q. How often did you run out?

A. Whenever there was a train going out and they had no conductor they sent me.

103 Q. That was after the accident?

A. After the accident.

Q. You got your orders at Lewis' Mills?

A. Yes, sir.

Q. And every time that you went out there was special orders for you to run back wild?

A. Yes, sir.

Q. And that order came from the train-dispatcher at Newark?

A. Came from Newark.

Q. From the train-dispatcher?

A. Yes, sir.

Q. And the way that the helper got back was by orders sent from Newark to that particular engine?

COURT: Then I understand you that every helper must have its special order for every trip?

A. Yes, sir; when he gets to Lewis' Mills he has to get an order from the dispatcher that he would run to Tunnel Hill and return wild.

Q. And if he did not get that order how would he return?

A. He cannot return. He has to wait until all trains pass or sneak down, as some of the boys call it.

Mr. TALLMAN:

Q. He cannot get back then at all, then, without an order?

A. Without he would steal back.

Mr. COLLINS:

Q. Or sneak back?

104 A. I don't know as I ever heard that until a few days ago.

Q. That is the way he would get back, either steal or sneak back?

A. I suppose he would have to go back.

Q. He would have no right to go back in that way?

A. No, sir.

COURT:

Q. Would it be his duty to send his fir-man down to Lewis' Mills and get orders—send him down afoot?

A. Yes, sir.

Q. You speak of trains running in sections. When a train is run in that way is there any signal or other indication by which it can be determined whether there is a following section?

A. Yes, sir.

Q. If there is, what is it?

A. They are all supposes to run on the same time, say, for instance, a train leaving at twelve o'clock; that train will carry red flags; they will put two red flags in front: that shows to other trains that there is a train following it that has the same rights as the one in front, and each section has the same right as the first section.

Q. Each section has the same flags?

A. Yes, sir; if they have white flags that indicates a wild train, and it has no rights. If two trains were coming east and one has white flags on, that would indicate a wild train, and they had
105 no right against this one at all.

Mr. COLLINS:

Q. Mr. Baugh, didn't your son commence firing on the first of September or some time in August of the year before?

A. I could not answer that question, indeed.

Q. His application was made on the first day of September, 1884, as a fireman to the Baltimore and Ohio Relief Association.

A. They may have been. I think perhaps he was firing a few days before they told him to go into the office and get out these papers—insurance papers.

Q. Now, let me ask you about running in sections. To run a train in sections means that the, say, three sections have a right to the same schedule?

A. That is, if the second section has red signals out or green—red it was when at that time—if the second section had two red signals that gave the third section the same rights as the first one.

Q. And the third section would not carry anything?

A. That would show that that was all there was of that run.

106 Mr. TALLMAN, counsel for plaintiff: We desire to offer this time schedule showing the schedule of trains going east and west on that day and especially certain rules:

Rule No. 9. "Trains are run under the charge of the conductors thereof and their directions relative to the management of trains will be observed except in cases where such directions may be in violation of the rules of this company or of safety, in which cases engineers will call the attention of the conductors to the facts as understood by them and decline compliance, conductors and enginemen being in such cases held equally responsible.

The same holds good in all cases of doubt. Enginemen as well as conductors must in every case absolutely know that they are entitled to the track before proceeding.

Whenever a train or engine is run without a conductor the engineman thereof will be also regarded as conductor and will act accordingly. The same rule will also be observed in case of a train breaking apart, leaving the engineman on forward portion of train without a conductor. Such engineman will for the time being at once assume the duties of the conductors in addition to his own and will be obeyed accordingly."

Rule 11. "Trains shall be designated on each time schedule under the general divisions of passenger and freight, but in addition to this all trains shall be classified on each time schedule, indicating thereby their priority of right to the track. Trains of the first class to be superior to those of the second class and all succeeding classes. Trains of the second class to be superior to those of the third and all succeeding classes, and so on indefinitely. Each time schedule to have such number of classes as may be desired. Trains of a superior class shall have the absolute right of track over trains of an inforior class, and trains of an inferior class shall keep entirely out of the way of trains of a superior class, invariably clearing their time not less than ten minutes at all points. 107

All trains which are classified on the regular time schedules shall be known as regular trains. All trains not classified on the regular time schedules shall be known as wild trains, and must invariably clear the time of all regular trains, of whatever class, not less than ten minutes at all points."

Rule 49 (extract). "Freight or wild trains are always to flag passenger trains when they get within ten minutes of their time, whether at a station or elsewhere."

Rule 52 (extract). "Trains must always be run with care and watchfulness, but especially must this be the case or portions of track where settling of track or trestles, land slides, or any other difficulties are to be apprehended; also through cities, towns, and villages. Wild trains are required to be especially watchful." 108

Rule 54. Before commencing their trips conductors and enginemen are required to ascertain positively whether all trains whose non-arrival would at all affect their own running have arrived. This will also apply to any intermediate points where trains may at any time end their trips.

In order to promote security in this matter all conductors on arrival at terminal station and at such other stations as may be designated will register their arrival in books provided for that purpose, adhering strictly to the form given in said books. These register books must be examined by all conductors and enginemen interested in order to obtain the information required, and especially to inform themselves as to what signals may have been carried by other trains."

Rule 56 (extract). "All demands for red signals must be made in writing, specifying exactly to what point they are to be carried, and the parties demanding them must see them put out before following. In addition to having red signals put out as specified put a flagman on the train which carries the red signals, to insure absolute safety."

COURT: I understand that you offer not the rules as a body, but the rules as specified?

109 Objection by counsel for defendant.

Mr. TALLMAN, counsel for plaintiff: I desire to offer the rules on page 64 as they refer to firemen; also on page 65, rules No. 124, 125, 126, 127, 129, 130:

Rule 124. "When in the shop or engine-house enginemen are under the control of the mechanical department; when on the road, are under the control of the transportation department."

Rule 125. "All enginemen and firemen are required to be at their *ats*tions at least thirty minutes before starting time, and must know that their engines are supplied with jack-screws and all necessary implements for use in case of accident. They must have the head lights and signal lights of their engines in complete order at all times and ready for immediate use when required, and when signal lights are carried they must see that they are kept burning for the entire distance they are ordered."

Rule 126. "Enginemen are required to observe the position of all switches, and, if there be levers, targets, or lights, to see that they indicate that switches are properly adjusted. They must know (so far as it is possible for them to do so) that switches are right before attempting to pass or use them. If wrong, the engine or train must, if possible, be stopped at once."

110 Rule 127. "Enginemen are required to examine bulletin board at Sandusky, Chicago Junction, Shawnee, Newark, and Bellaire daily and keep themselves thoroughly informed in regard to all instructions posted thereon."

Rule 129. "Approach any station where another train is due or may be expected with train under full control. Enginemen and firemen must be constantly on the alert to see and obey signals while doing station or switching work, and while running on road must frequently look back for signals and see that train has not parted."

Rule 130. "Enginemen must not permit any person to ride on the engine without a written order from the general manager, general superintendent, master of transportation, master or *or* ass't master of machinery, except such of the crew whose duty calls them there and the proper officers of the road when on duty.

"Both conductors and enginemen will be held personally responsible for the violation of this rule.

"Supervisors of trains and engines will see that this rule is strictly adhered to."

Rule 70 (extract). "All persons entering into or remaining in the service of this company are warned that the business is hazardous, and that in accepting or retaining employment they must assume the ordinary risks attending it.

"Each employé is expected and required to look after
111 and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, especially in the switching of cars and in all movements of trains."

Rule 77. "All employés must familiarize themselves with the general and special rules pertaining to their respective positions. If in doubt as to the meaning of any rule or special order application must be made at once to proper authority for an explanation. Ignorance cannot be accepted as an excuse for neglect or omission of duty."

112 W. J. Baugh, recalled in behalf of plaintiff, being previously sworn, testified as follows:

Mr. Tallman:

Q. What did the crew on the helper consist of prior to this accident?
A. Why, engineer and fireman.
Q. There was no conductor on them?
A. No, sir.
Q. No conductor on the helper that Mr. Baugh was injured on?
A. No, sir.

No cross-examination.

113 John Baugh, plaintiff, recalled, having been previously sworn, testified as follows:

Mr. Tallman:

Q. If orders were given there at Lewis' Mills, to whom were they given?
A. The engineer.
Q. Your engineer was Hite?
A. Yes, sir.
Q. Do you know where he is?
A. No, sir; not exactly.
Q. Has he left this country?
A. Yes, sir.
Q. Where was he the last that you heard of him?
A. In Montana.
Q. What has become of that order, if you know?
A. I do not know.
Q. What was generally done with those orders by the engineers?

Objection by defendant's counsel.

By Mr. Tallman:

Q. Are they preserved?
A. Throw the*y* away.

Court: The proper question is whether there is any rule that these orders are filed. The witness can so state. If they are not preserved he can state that, if he knows.

Q. Are these orders preserved by the enginerr any longer than the run is out?

A. No, sir.

No cross-examination.

114 Deposition of Herman L. Hoge read in evidence by plaintiff's attorney. Said deposition is hereto attached (page 48) and made part hereof, marked "Exhibit A."

Thereupon the plaintiff rested his case, the foregoing being all the testimony offered and given by the plaintiff to the jury.

Thereupon the defendant, by its counsel, moved the court to direct a nonsuit in this case upon the ground that under the pleadings and testimony offered by the plaintiff judgment should be in favor of the defendant; which motion the court overruled; to which ruling of the court the defendant, by its counsel, then excepted.

Thereupon the defendant moved the court to direct a verdict in its favor for the reason that under the pleadings and testimony in this case the plaintiff is not entitled to recover, and the testimony offered by the plaintiff will not support a verdict in his favor if so rendered by the jury.

Which motion the court overruled; to which ruling of the court the defendant, by its counsel, then excepted.

Thereupon the defendant declined to offer any testimony whatever in the cause, and the same was submitted on the testimony contained in this bill of exceptions and which contains all the testimony in the case.

115 After argument to the jury by counsel, the court charged the jury with reference to the law governing the case; to certain portions of which the defendant, by its counsel, excepted; which portions so excepted to are hereinafter set out.

The portions of the charge so given and excepted to are the following:

"Gentlemen, this suit is maintainable only upon the ground that the injury which the plaintiff received resulted from the negligence of the agents and representatives of the defendant company, he being in its employ, and not resulting from the negligence or default of a fellow-servant."

To which portion of the charge so given the defendant, by its counsel, excepted, as not stating correctly the law with reference to the liability of the defendant to the plaintiff on the cause of action contained in the petition in this case.

Thereupon the court charged the jury as follows:

"If the injury results from negligence or carelessness on the part of one so placed in authority over the employé of the company who is injured as to direct and control that employée, then the company is liable.

116 Now, it is claimed on behalf of the plaintiff that upon this occasion the engineer, Hite, of the locomotive upon which the plaintiff was employed as fireman was also its conductor when

it was being operated, not as a helper, but finding its way back to Bellaire, its starting point.

That there were only two persons upon the locomotive—the engineer, who was in charge, who had the control of the movements of the locomotive, and the plaintiff, who was the fireman and the engineer's subordinate; that this accident and injury resulted from the negligence of the engineer in causing the locomotive to be upon the track at the time when the passenger train from Bellaire west was entitled to the road and was due; that the fireman had no discretion, no authority, but was compelled to submit to the orders of the enginees in that behalf.

It is claimed on behalf of defendant that the engineer had no such control; that he was not the superior of the fireman in the sense in which the conductor of a passenger train is the superior of the brakeman; that it appears by the testimony of the plaintiff himself that this locomotive had no right to the track; could not be moved upon the track or placed upon the track without special orders from the company through its train-dispatcher at Newark; that therefore the fireman and the engineer were fellow-servants; that the engineer did not have the control; that all he had to do was to operate the engine when he received orders, and conduct the locomotive
117 accordingly; whereas the conductor of a train, having his schedule, has the right to proceed along the line of the road according to the schedule, and is subject to special orders only when he has lost the right to the road by being out of time.

Now, it is for you to decide, upon the testimony, what the relation in fact of Hite, the engineer, and Baugh, the plaintiff, was. Were they fellow-servants in the sense in which I have defined that expression, or was Baugh the subordinate, and was Hite, the engineer, the representative of the company, placed over him to direct and control his actions?

If they were fellow-servants the plaintiff has no right to recover, whatever injury he may have sustained. If Hite, the engineer, was the agent or representative of the company and Baugh, the fireman, acted under his direction and subject to his orders and the inkury resulted from the default or negligence or wrong of the engineer, why then it must be attributed to the company as the negligence, default, or wrong of the company, and it is for you to say."

To the foregoing portion of said charge the said defendant also at the time excepted and to each part of the same as incorrectly stating the respective claims of the plaintiff and the defendant; and the defendant also excepted to so much of the charge of the court as above given as submits to the jury the question as to whether Hite was the superior of the plaintiff and for whose negligence the defendant is responsible to the plaintiff, and the defendant
118 also excepts to the foregoing portion of said charge for the reason that said charge incorrectly states the law with regard to the liability of the defendant for the injury complained of by the plaintiff in this case.

The charge of the court to the jury in full is hereto attached and made part hereof and marked "Exhibit B."

Thereupon and during the trial of said cause came the defendant and presented to the court this its bill of exceptions taken on the trial thereof; which bill of exceptions, having been examined by the court and found to be in all respects correct, is allowed, signed, and sealed by the court and ordered to be made a part of the record in this case.

Witness the signature and seal of the Honorable George R. Sage, district judge, sitting in and holding said *said* court, this 6th day of June, A. D. 1888.

GEO. R. SAGE, [SEAL.]
U. S. District Judge, Sitting in and Holding the Circuit Court upon the Trial of the Above-Entitled Cause.

119 "EXHIBIT A."

Depositions of sundry witness- taken before me, F. P. McNell, a notary public within and for the county of Ohio, in the State of West Virginia, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the plaintiff in an action pending in the circuit court of the United States for the southern district of Ohio, eastern division, in which John Baugh is plaintiff and The Baltimore and Ohio Railroad Co. is defendant, James C. Tallman being present on behalf of plaintiff and *and* —— —— on behalf of defendant.

HERMAN L. HOGE, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

1st Q. State your name, age, occupation, and place of residence.

Ans. Name, Herman L. Hoge; age, about 34 years; residence, Wheeling, West Virginia; occupation, hardware merchant.

2nd Q. Where did you reside about May 4, 1885?

Ans. Lewis' Mills, Ohio, on line of Central Ohio division, Baltimore & Ohio railroad.

3rd Q. What were you engaged in at that time?

Ans. I was agent and telegraph operator for the Baltimore and Ohio railroad.

120 4th Q. How long had you been in the employ of the Baltimore and Ohio R. R. Co. as agent and telegraph operator at that time?

Ans. As agent and telegraph operator I was about six years, and for about five years before that I was just telegraph operator.

5th Q. Do you remember the occasion of a collision some distance west of your station between a passenger train going west and a helper coming east, in which the fireman of the helper, Mr. John Baugh, was injured?

Ans. Yes, sir; I remember their having a collision very distinctly about May 4th, 1885, but I did not see it. I heard that Mr. Baugh was hurt.

6th Q. Do you know whether the passenger train going west that morning with which the helper collided received any orders at your office?

Ans. To my recollection, they did not, or they were on time or nearly so.

7th Q. Do you know of any order sent to the helper that morning?

Objection by defendant. Sustained.

Ans. I can't remember now.

8th Q. Did the helper receive any orders at your office that morning?

Objection by defendant. Sustained.

121 Ans. I believe they did. I believe I was on duty when the helper went up the hill; if they received any order it was to return wild from Burton's to Bellaire.

9th Q. Did the helper going from Bellaire west usually have orders; and, if so, what were those orders?

Objection by defendant. First part of answer allowed to be read.

Ans. Yes, sir; I never knew one to go up unless they had orders to return wild from Burton's to Bellaire, unless protected by flag.

10th Q. Was there any schedule time for helpers to run on?

Ans. There was not.

11th Q. When did you quit the service of the company?

Ans. On the morning of April 30, 1887.

12th Q. Did these helpers have any conductors prior to the accident to the plaintiff, John Baugh?

Ans. No, sir.

13th Q. How was it after the accident?

Objection by defendant. Sustained.

Ans. They placed conductors with helpers.

14th Q. Prior to this accident what was the crew of a helper?

122 Ans. Engineer and fireman.

15th Q. What was the crew after the accident?

Objection. Sustained.

Ans. Conductor, engineer, and fireman.

And further this deponant saith not.

HERMAN L. HOGE.

On account of the absence of the witness S. W. Drake, who was subpœnead to attend as a witness, the further taking of these depositions was at the request of the plaintiff adjourned until to-morrow, May 18, 1888, at 8 o'clock a. m.

F. P. McNELL,
Notary Public.

[SEAL.]

Exceptions by plaintiff's attorneys to all questions objected to by defendant.

123 "EXHIBIT B."

Charge.

SAGE, *J.*, orally:

GENTLEMEN: This action, as you have already been advised by the statements of counsel and the reading of the petition, is an action for damages for personal injury received by the plaintiff while in the employment of the defendant, The Baltimore and Ohio Railroad Company, as fireman, by reason, the plaintiff alleges, of the negligence of the agents and representatives of the company in the operation of a locomotive upon which he was engaged on the 4th of May, 1885, while attempting to return from Burr's Mills, some 20 or 21 miles, to Bellaire. The nature of the damages or the claim for damages is set forth in the petition by the following allegations:

That the locomotive having come in collision with a passenger train upon the track between Belmont and Lewis' Mills, the plaintiff was "greatly and permanently injured, being mangled and bruised to such an extent that his right arm had to be amputated near the shoulder; that he is unable to use his right leg in walking, and is otherwise seriously injured and hurt, causing him great
124 pain and suffering and permanently injuring and disabling him
to such an extent that he cannot hereafter earn his living by manual labor, which was the only means of earning a livelihood that plaintiff had."

Wherefore he prays for judgment in the sum of thirty thousand dollars.

Gentlemen, this suit is maintainable only upon the ground that the injury which the plaintiff received resulted from the negligence of the agents and representatives of the defendant company, he being in its employ, and not resulting from the negligence or default of a fellow-servant.

The law assumes that when a person enters into any employment he assumes the risks incident to that employment, so far as they may result from the nature of the employment itself or from the negligence or default of its fellow-servants—that is, those who are not placed in authority and control over him, but who occupy substantially the same relation to the company as he does. He is held to assume the risks incident to his employment for two reasons and the risks incident to the default or negligence of his fellow-servants: The first is that the law presumes that, taking those risks into account, he stipulates for compensation accordingly, and therefore is not entitled to recover damages; and, secondly, because it has been presumed that it was in accordance with public policy that the law should so hold in order to stimulate those in a dangerous employment (in the case of a railroad those who were employed
125 upon a train) to so watch and guard the conduct of each
other as to prevent the results of negligence and consequent injury to passengers and those who sustain no relation of servant or employee to the company.

The Supreme Court of the United States has said in a case which has been referred to in argument by counsel that this last proposition ought, probably, to have very little force—that is to say, this last reason, for it seemed to the court that the danger itself and the natural desire to avoid it would be sufficient stimulant to the employé to guard against the carelessness of his fellow-servants, and that the mere fact that he would not be entitled to recover damages for any injury which he might himself sustain would not amount to any sufficient reason of itself for establishing this rule. However that may be, the rule itself is recognized.

Now, there is an exception to this rule. If the injury results from negligence or carelessness on the part of one so placed in authority over the employ of the company who is injured as to direct and control that employ, then the company is liable.

For illustration: The conductor of a train, it has been held, represents the company in the management of that train and the company will be responsible for an injury to a brakeman or to a fireman resulting from the negligence or default of that conductor, although the brakeman could not recover for an injury resulting from
126 the default or negligence of the fireman, because the brakeman is not under the control of the fireman, but he is under the control of the conductor, subject to special orders from the general train-master directing the movements of the train on special occasions by telegraph. But I am referring to the ordinary movement of the train.

Now it is claimed on behalf of the plaintiff that upon this occasion the engineer, Hite, of the locomotive upon which the plaintiff was employed as fireman was also its conductor when it was being operated, not as a helper, but finding its way back to Bellaire, its starting point; that there were only two persons upon this locomotive—the engineer who is in charge, who had the control of the movements of the locomotive, and the plaintiff, who was the fireman and the engineer's subordinate; that this accident and injury resulted from the negligence of the engineer in causing the locomotive to be upon the track at the time when the passenger train from Bellaire west was entitled to the road and was due, and that the fireman had no discretion, no authority, but was compelled to submit to the orders of the engineer in that behalf.

127 I shall not undertake, gentlemen, to review the testimony. You have heard it and you will remember it.

It is claimed on behalf of defendant that the engineer had no such control; that he was not the superior of the fireman in the sense in which the conductor of a passenger train is the superior of the brakeman; that it appears by the testimony of the plaintiff himself that this locomotive had no right to the track; could not be placed upon the track or moved without special orders from the company through its train-dispatcher at Newark; that therefore the fireman and the engineer were fellow-servants; that the engineer did not have the control; that all he had to do was to operate the engine when he received the orders, and conduct the locomotive accordingly; whereas the conductor of a train, having his schedule, has the right to proceed along the line of the road according to the schedule, and is *a* subject to special orders only when he has lost the right to the road by being out of time.

Now it is for you to decide upon the testimony what the relation in fact of Hite, the engineer, and Baugh, the plaintiff, was. Were they fellow-servants in the sense in which I have defined that expression, or was Baugh the subordinate and was Hite, the engineer, the representative of the company placed over him to direct and control his actions?

If they were fellow-servants the plaintiff has no right to recover, whatever injury he may have sustained.

128 If Hite, the engineer, was the agent or representative of the company and Baugh, the fireman, acted under his direction and was subject to his orders, and the injury resulted from the default or negligence or wrong of the engineer, why then it must be attributed to the company as the negligence, default, or wrong of the company, and it is for you to say.

If you find the facts upon this part of the case in favor of the plaintiff, your next duty will be to ascertain what were the damages. This is not a case for vindicative or exemplary damages. It is a case, if for damages at all, for compensatory damages—that is, such award as will compensate the plaintiff for the injury he has actually sustained.

You have heard the testimony as to the age of the plaintiff. I think he was about 23 years old at the time of this accident, or 24; that he lost his arm; that he has suffered such injury in one of his legs as to permanently lame him, and that he has thereby been deprived in very large measure of the ability to earn a livelihood.

Now if you find that this accident resulted from the negligence or default of the company through its agent or representative—in other words, if you find that the engineer occupied that relation—then it would be your duty to assess the damages upon the principal or upon the rule which I have stated. If, on the other hand,
you find that the engineer had no authority excepting to *to*
129 drive that engine in accordance with the rules or orders re-
ceived from the principal officers of the company, and that these men were fellow-servants, then your verdict should be for the defendant.

You may take the case, gentlemen.

There is a second answer, gentlemen, which was disposed of before the case was brought before the jury, and that answer you need not pay any attention to. The issue is raised by the first answer, which is a general denial. I may say (which will relieve you from the necessity of examining these pleadings at any great length) that the petition sets forth the claim for damages and the facts upon which it is based, and the answer, admitting the incorporation of the Baltimore and Ohio Railroad Company, denies all the allegations relating to the injury.

130 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern division of the southern district of Ohio, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John Baugh and The Baltimore and Ohio Railroad Company, a manifest error hath happened, to the great damage of the said The Baltimore and Ohio Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court,
South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24th day of October, 1888, in the year of our Lord one thousand eight hundred and eighty-eight.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

131 [Endorsed:] United States circuit court, S. D. O., E. D. No. 236. John Baugh *vs.* The B. & O. R. R. Co. Writ of error. Filed ——, 18—. —— ——, clerk.

132 THE UNITED STATES OF AMERICA, *ss:*

To John Baugh, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern division of the southern district of Ohio, wherein The Baltimore and Ohio Railroad Company — plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 24th day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

GEO. R. SAGE,
Judge of the U. S. District Court, S. D. O., Sitting and Holding the Circuit Court of said District, no Circuit Judge or Circuit Justice being Present.

[Endorsed :] United States circuit court, S. D. O., E. D. No. 236. John Baugh *vs.* The B. & O. R. R. Co. Citation to defendant in error. Filed ——, 18—. —— ——, clerk.

133 THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
JOHN BAUGH, Defendant in Error.

The said John Baugh, defendant in error, accepts service in this case, enters his appearance herein, and waives any other or further service of this writ of citation.

L. DANFORD & JAMES C. TALLMAN,
Attorneys for Defendant in Error.

134 And afterwards, to wit, on the 2nd day of November, A. D. 1888, the following supersedeas bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Supersedeas Bond.

Circuit Court of the United States, Southern District of Ohio, Eastern Division, *ss:*

JOHN BAUGH
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY.

Know all men by these presents that we, the Baltimore and Ohio Railroad Company, as principal, and William A. Hershiser and James H. Collins, are held and firmly bound unto John Baugh in the sum of fourteen thousand dollars, to be paid to the said John Baugh, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this second day of November, 1888.

Whereas the above-named The Baltimore and Ohio Railroad Company has taken out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

135 Now, therefore, the condition of this obligation is such that if the above-named The Baltimore and Ohio Railroad Company shall prosecute their said writ of error to effect and answer the full amount of judgment and their costs if they shall fail to make

good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

THE BALTIMORE AND OHIO
RAILROAD COMPANY. [SEAL.]
JAMES H. COLLINS. [SEAL.]
WM. A. HERSHISER. [SEAL.]

Sealed and delivered in presence of—
—— ——.

The above security is approved.

GEO. R. SAGE,
Judge of the United States District Court, S. D. O.

136 In the Supreme Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
JOHN BAUGH, Defendant in Error.
} Assignment of Errors.

And the said The Baltimore and Ohio Railroad Company now comes and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The court erred in overruling the demurrer of the defendant to the petition of the plaintiff.

Second. The court erred in sustaining the demurrer of the plaintiff to the second answer of the defendant as amended.

Third. The court erred in refusing to direct a nonsuit at the close of the testimony of the said plaintiff.

Fourth. The court erred in refusing to direct a verdict in favor of the defendant at the close of said testimony.

Fifth. The court erred in its charge to the jury excepted to by the defendant.

Sixth. The court erred in overruling the motion of the defendant for a new trial therein.

Seventh. The said judgment was given in favor of the said John Baugh, whereas by the laws of the land it ought to have been given in favor of the said The Baltimore and Ohio Railroad Company.

137 Wherefore the said The Baltimore and Ohio Railroad Company prays that the said judgment may be reversed, annulled, and held for nothing, and that it may be restored to all things it has lost by reason thereof.

138 THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record in said court.

Seal of the Circuit Court,
South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, O., this 10th day of November, A. D. 1888.

B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*.

Endorsed on cover: Case No. 13,636. S. Ohio C. C. U. S. No. 417. The Baltimore and Ohio Railroad Company, plaintiff in error, *vs.* John Baugh. Filed September 17, 1889.

149 US 368

Office Supreme Court U. S.
FILED.
DEC 7 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

RECORD. CASE No. 13,636.

TERM No. 89. **OCTOBER TERM, 1892.**

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Plaintiff in Error,*

vs.

JOHN BAUGH.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN K. COWEN,
HUGH L. BOND, Jr.,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

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THE BALTIMORE AND OHIO RAILROAD
COMPANY, *Plaintiff in Error*,

vs.

JOHN BAUGH.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is an action brought by John Baugh, defendant in error, to recover damages for injuries received in a collision while employed as fireman on a locomotive of the plaintiff in error. The locomotive was manned by one Hite as engineman and Baugh as fireman, and was what is called in the testimony a "helper." On the morning of May 4th, 1885, it left Bellaire, Ohio, attached to a freight train which it helped to the top of the grade about twenty miles west of that point. (Baugh's testimony, Record, page 40.)

At the top of the grade the "helper" was detached and went on a turntable. These helpers had no place on the train schedules, and no right to the track as against scheduled trains. In the absence of special orders from the train dispatcher at Newark, the helper could get back to Bellaire only by following close behind some regular scheduled train, which train would carry signals to inform those coming in the opposite direction that the helper was following it. This method is called, in the testimony, "flagging back." On this May morning Hite and Baugh started back toward Bellaire without special orders and not following any scheduled train; as Baugh testified, (Record, page 45,) "why, we just pulled out and run back." The result was that they met in collision the regular local passenger train from Bellaire, which was running on its schedule time and had the right of road.

Baugh had been in the employ of the railroad company about a year, had been a fireman about six months, and had run on the helper, two trips a day, about two months. (Record, pages 42–3.) He knew that the helper had to keep out of the way of trains, (Record, page 44,) and was familiar with the method of "flagging back," (Record, pages 46–47.)

The Record contains all the testimony, which is exclusively that of the plaintiff. At the conclusion of the plaintiff's case the defendant by its counsel moved the Court to direct a nonsuit, but the motion was overruled, the defendant excepting. Defendant also asked the Court to direct a verdict in its favor, on the ground that under the pleadings and testimony in the case the plaintiff was not entitled to recover, and the testimony offered by the plaintiff would not support a verdict in his favor. This motion the Court overruled also, the defendant excepting. The defendant offered no testimony.

The Court charged the jury as set out on pages 62 to 64 of the Record. The jury returned a verdict for plaintiff of $6,750, and the Court, overruling defendant's motion for a new trial, entered a judgment on the verdict. (Record, page 32.)

ASSIGNMENT OF ERRORS.

The assignment of errors in the Record (page 67) assigns seven errors. We shall urge only the third, fourth and fifth, as follows:

"*Third.* The Court erred in refusing to direct a nonsuit at the close of the testimony of the said plaintiff.

"*Fourth.* The Court erred in refusing to direct a verdict in favor of the defendant at the close of said testimony.

"*Fifth.* The Court erred in its charge to the jury excepted to by the defendant."

The exceptions to the charge will be found at pages 58 and 59 of the record. The second exception is as follows:

"Thereupon the Court charged the jury as follows:

"If the injury results from negligence or carelessness on the part of one so placed in authority over the employe of the company, who is injured, as to direct and control that employe, then the company is liable.

"Now, it is claimed on behalf of the plaintiff that upon this occasion, the engineer, Hite, of the locomotive upon which the plaintiff was employed as fireman, was also its conductor when it was being operated, not as a helper, but finding its way back to Bellaire, its starting point.

"That there were only two persons upon the locomotive—the engineer, who was in charge, who had the control of the movements of the locomotive, and the plaintiff, who was the fireman and the engineer's subordinate; that this accident and injury resulted from the negligence of the engineer in causing the locomotive to be upon the track at the time when the passenger train from Bellaire west was entitled to the road and was due; that the fire-

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The exceptions to the charge will be found at pages 58 and 59 of the record. The second exception is as follows:

"Thereupon the Court charged the jury as follows:

"If the injury results from negligence or carelessness on the part of one so placed in authority over the employe of the company, who is injured, as to direct and control that employe, then the company is liable.

" Now, it is claimed on behalf of the plaintiff that upon this occasion, the engineer, Hite, of the locomotive upon which the plaintiff was employed as fireman, was also its conductor when it was being operated, not as a helper, but finding its way back to Bellaire, its starting point.

" That there were only two persons upon the locomotive—the engineer, who was in charge, who had the control of the movements of the locomotive, and the plaintiff, who was the fireman and the engineer's subordinate; that this accident and injury resulted from the negligence of the engineer in causing the locomotive to be upon the track at the time when the passenger train from Bellaire west was entitled to the road and was due; that the fireman had no discretion, no authority, but was compelled to submit to the orders of the engineer in that behalf.

"It is claimed on behalf of defendant that the engineer had no such control; that he was not the superior of the fireman in the sense in which the conductor of a passenger train is the superior of the brakeman; that it appears by the testimony of the plaintiff himself that this locomotive had no right to the track; could not be moved upon the track or placed upon the track without special orders from the company through its train-dispatcher at Newark; that therefore the fireman and the engineer were fellow-servants; that the engineer did not have the control; that all he had to do was to operate the engine when he received orders, and conduct the locomotive accordingly; whereas the conductor of a train, having his schedule, has the right to proceed along the line of the road according to the schedule, and is subject to special orders only when he has lost the right to the road by being out of time.

"Now, it is for you to decide, upon the testimony, what the relation in fact of Hite, the engineer, and Baugh, the plaintiff, was. Were they fellow-servants in the sense in which I have defined that expression, or was Baugh the subordinate, and was Hite, the engineer, the representative of the company, placed over him to direct and control his actions?

"If they were fellow-servants the plaintiff has no right to recover, whatever injury he may have sustained. If Hite, the engineer, was the agent or representative of the company, and Baugh, the fireman, acted under his direction and subject to his orders, and the injury resulted from the default or negligence, or wrong of the engineer, why then it must be attributed to the company as the negligence, default, or wrong of the company, and it is for you to say."

"To the foregoing portion of said charge the said defendant also at the time excepted, and to each part of the same as incorrectly stating the respective claims of the plaintiff and the defendant; and the defendant also excepted to so much of the charge of the Court as above given, as submits to the jury the question as to whether Hite was the superior of the plaintiff, and for whose negligence the defendant is responsible to the plaintiff, and the defendant also excepts to the foregoing portion of said charge, for the reason that said charge incorrectly states the law with regard to the liability of the defendant for the injury complained of by the plaintiff in this case."

The errors assigned raise three questions of law:

A. Did the Court in its charge lay down correctly the law as to the liability of a master for injury to one servant caused by the negligence of another?

B. Did the Court err in submitting to the jury the question of the defendant's liability under the evidence, instead of deciding it as a matter of law?

C. Did Baugh's own testimony prove contributory negligence on his part?

ARGUMENT.

A. The Court below adopted in the broadest way the doctrine of "superior and subordinate," which may properly be called the Ohio doctrine. "If the injury results from negligence or carelessness on the part of one so placed in authority over the employe of the company who is injured as to direct and control that employe, then the company is liable." This is the law as laid down by the Supreme Court of Ohio in Pittsburgh, Fort Wayne and Chicago Railway Company vs. Devinney, 17 Ohio State 198, 211. Some few of the Circuit Courts of the United States, particularly those in Ohio, have absorbed the Ohio doctrine, while the great majority of the United States Circuit Courts have refused to adopt it.

The law of master and servant is not uniform in the United States Circuit Courts, but displays the greatest variety. Because of this conflict in the decisions in the different Circuit Courts, and especially in view of the establishment of Circuit Courts of Appeal for each circuit, we ask this Court to examine into the principles which lie at the foundation of the law on this subject, and to restate those principles in such a way that a uniform rule may be deduced from them for the guidance of all the Federal Courts. We shall take the liberty of troubling the Court with an examination of the principles which underlie the law on this subject. We must begin with first principles to ascertain what is the true rule of the liability of a master to his servant.

"It is laid down by Blackstone," said Chief Justice Shaw, in Farwell v. Boston and Worcester Railroad Corporation (4 Metcalf, 49), "that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise, the servant shall answer for his own misbehavior. (1 Bl. Com. 431; McManus v. Crickett, 1 East 106.) This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security.

"But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in the contemplation of law, must be presumed to be thus regulated.

"The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and, it was conceded, that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. * * *

"The general rule resulting from considerations, as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any other."

We have chosen as our text the language of Chief Justice Shaw, because we would have this Court approach the subject as he did, free from the obscurity that later decisions have cast about it.

The subject divides itself naturally, as he divided it, into two heads, viz:

1. The application of the principle expressed in the maxim *respondeat superior*.

2. The duties toward the servant imposed by law upon the master.

I. The English Parliament, in the session of 1875–6, appointed a select committee of fifteen members to examine into the subject of the relations of master and servant under the law. This committee continued the examination through two sessions of Parliament, took the testimony of the men best informed upon the subject in the kingdom—barristers, judges and others—and took every means to get all the knowledge that could be got, as well of the law of master and servant and its history as of its practical workings. We quote from the report of the majority of the committee, whose recommendations resulted in the Employers' Liability Act (43 & 44 Vict. ch. 42.):

"At present a master is not liable for any injury which arises from the act or default of any fellow-servant, whether that fellow servant be in a position of authority or not; and in ascertaining whether the person to whose act or default the injury is due is a fellow-servant, the widest possible construction is given to the term, 'Common Employment.'

"That a man should be liable for injury occasioned by his own act, neglect or permission, is obviously just. That a man should be liable for injury occasioned by acts which he has neither done nor permitted, which have resulted from no neglect of his, or in disobedience to his order, or which he may have forbidden, is a result the justice of which it is not easy at once to recognize, and one which some eminent lawyers do not hesitate to describe as 'essentially unjust.' Such, however, is, and since the reign of Charles the Second appears to have been, the law of this country as to injuries occasioned by servants in the course of their employment to persons not in the same employment. For such injuries the master employing the servant is liable, notwithstanding that the acts which occasioned them may not have been ordered or authorized, or may even have been forbidden.

"There is a strong concurrence of authority against the justice of this law, though there seems to be some difference of opinion as to its origin and historical development. Some regard it as having been established on considerations of policy, as distinguished from justice; others as a mistaken application of the maxim, *Qui facit per alium facit per se.* A very slight examination of the principle involved in this maxim, which obviously relates to agency, will show that it is inapplicable to cases where the act causing the injury is done either without authority or in defiance of it. The probability is that the rule was an application of the maxim *respondeat superior;* and this probability is increased by the consideration that none of the decisions which have explained and determined the law have ever extended it beyond the limits to which that maxim would properly apply. The state of society in which the maxim *respondeat superior* obtained had passed away long before the English law was established; but there is a certain analogy, so far as effects third parties, between the position of a master hiring servants and a master or *paterfamilias* employing his slaves or children. In each case there is a single task or enterprise carried on by several persons, and it is not difficult to see how the master, the *superior*, he who puts the enterprise in motion, was held responsible to persons outside for any injury resulting from the enterprise by whomsoever occasioned; an analogy which may explain, if it does not justify, the law.

"But there is no record that the master or *superior* was liable for injury occasioned to any person engaged in the enterprise. The slave or child under the Roman law had no choice and no rights, and the English courts have always considered that a servant, who is free to choose whether he will or will not take part in the enterprise or task, by the contract of service itself undertakes to run all risks necessarily incident to the employment, the principal and most obvious of which is the injury which the negligence of others engaged in the same employment may occasion.

"For upwards of one hundred and fifty years after a master was held liable for injuries occasioned to strangers, no attempt to extend the liability to cases of injury occasioned by fellow-workmen is recorded; and when at last such an attempt was made in the well-known case of Priestly v. Fowler, which was decided in 1837, the Court at once refused to extend the principle to cases to which it was not applicable, and that on the broad ground that a man is free to take the employment or not, but that if he chooses to do so he takes it with all attendant risks. The decision in the case of Priestly v. Fowler, if not the whole of the reasoning on which it is based, has been generally approved and followed by the Courts in this country and in the United States.

"This judgment has, however, been the subject of much adverse criticism. It is contended that, whether the law throwing on the master the responsibility for injuries occasioned to strangers be just or unjust, the exception in regard to injuries occasioned by fellow-workmen is simply an exception to an established rule; and it is regarded as an exception specially directed against and injurious to those who from their position are most in want of the protection of the rule. But your committee consider that this view is not well founded; and they have the high authority of the late Lord Chief Baron Pollock for saying that the Court, in Priestly v. Fowler, laid down no new law. He says: 'I believe it was the law; I thoroughly understood it to be so before attention was called to it.' The true principle of the law is, that no man is responsible except for his own acts and defaults; and the rule relied upon is itself not a rule, but an exception, which the Courts have explained and confined within proper limits."

As stating the opposing view of this branch of the law and its history, we quote the report of the minority of the same committee. The minority report explains the liability of the master to third persons as an application of the principle expressed by the maxim, *Qui facit per alium facit per se*, contends that the principle applied originally in favor as well of fellow-servants as of strangers, and accuses the Courts of having entirely altered, by judicial decision, the "common law, as it was believed to be up to 1837":

"This has been effected by means which appear to the committee to be of the most questionable nature—the inventing and enforcing a contract which never really existed. Where, beside what is expressed in a contract, there is something else in the contemplation of both parties which they would have expressed had either party required it, the committee can understand that the Courts of law may be perfectly justified in saying that such a contract must be taken to have been entered into. But, so far from this being the case, the contract which the judges have assumed to be entered into by every operative, involving as it does the cession of most important rights without any consideration, is utterly unknown to the person to be bound by it, and was in its full extent, as will presently appear, unknown to the judges themselves.

"Lord Justice Bramwell remarks that the expression which has been used, that a servant contracts that he will make no claim against the master for injury done by the negligence of a fellow-servant, is an unfortunate one. The obvious difficulty in that mode of expressing it is, that neither master nor servant ever think of such a matter when they enter into the relation of master and servant.

"Justice Brett says (Question 1919): 'I say now that the law is that you cannot properly import any condition or stipulation into a contract, except one which in the minds of all reasonable men must have been in the contemplation and intention of both parties to the contract at the time it was made.'

"Another hardship connected with the proceedings of the judges is the gradual expansion of the contract which they created. They held that a fellow-servant could not by his carelessness impose any liability on his master, and then the question became all important, who was a fellow-servant? By degrees it has been held that everyone, except the master, in an industrial undertaking, is a fellow-servant with every other person employed in any capacity; thus the implied contract has swelled gradually, till the term fellow-servant is no longer required, and the rule may be stated thus: The master is liable for his own personal negligence, and for no other. Had the Court foreseen this result, all discussion as to what constitutes a common employment would have been unnecessary."

In the present discussion the importance of the issue joined between the majority and minority of the committee in their respective reports cannot be exaggerated. We are seeking to ascertain the origin and nature of the general rule of law that leaves the master free from liability to one of his servants for the negligence of another, so that we may apply the rule to particular cases. Clearly, if the master's freedom from liability is by virtue of a condition implied by law in the contract of employment, as the minority report contends—an exception created by judicial legislation to an otherwise universal principle of law—we must determine the scope of the exemption by very different criteria than if, as the majority report finds, the exemption exists, because no principle of the common law extended the master's responsibility for his servant's negligence beyond liability to persons not engaged in the enterprise.

The views expressed by the minority report need no refutation beyond the clear statement there given them. That the Courts of England and of this country have gradually expanded a contract invented by the judges, and thus created an exemption for the master unknown to the common law, is an assumption too absurd to require disproof. An examination of the earliest decisions will show that they rest primarily on the ground that the rule of *respondeat superior* does not apply in favor of one connected with the enterprise, and secondarily on the ground that the master does not warrant the safety of his servant.

Priestley v. Fowler, 3 M. & W. 1.
Murray v. South Carolina R. R. Co. 1 McMullan, 385.
Farwell v. R. R. Corp., *supra*.

The argument in support of the first ground was that while the doctrine of *respondeat superior* had long been recognized, yet never had a servant sustained an action against his master for an injury received from a fellow-servant in the master's service.

On the second ground the argument is nowhere better stated than in the second passage above quoted from the opinion of Chief Justice Shaw in Farwell v. Boston and Worcester Rwy. Corp. 4 Metc. 49.

But it is important to note that in this passage Chief Justice Shaw is answering the argument of the plaintiff's counsel that the master warrants the servant's safety. In the argument of the case, counsel abandoned the contention that the defendant was responsible under the rule of *respondeat superior*. He sought to avoid the decision in Priestly v. Fowler by arguing that under the contract of employment the defendant must protect the plaintiff.

The passage is often quoted in later decisions, as if it stated the reasons why the rule of *respondeat superior* did not apply in favor of the servant, and is misinterpreted as basing the whole doctrine of the master's exemption on an implied contract or condition of employment.

In fact, the decision was in favor of the master in each of the three cases we have cited: (1) because the rule of *respondeat superior* did not apply, and (2) because the mere relation of master and servant did not imply an obligation on the master's part to compensate the servant for injury received in the service.

These two reasons are negative in their character. They do not state an exemption properly so-called, but rather an absence of liability, existing not by reason of any exempting contract or condition, but because no legal wrong is shown to charge the master. The master must be responsible, if at all, either by virtue of the rule *respondeat superior* or by virtue of the relation of master and servant existing between him and the injured servant. To vary the statement, the master must be liable, if at all, either by virtue of his relations to the servant causing the injury or by virtue of his relations to the servant injured.

Under the rule of *respondeat superior*, the master is responsible for injuries caused by his servant to third persons, strangers to the master's service. Why? For reasons found in the history of our law. The master is not responsible for injuries caused by his servant to another in his service. Why? For like reasons connected with the history of our law. But the distinction is made by reason of the relations in each case between the injured one and the master, not by reason of any relations between the servant causing the injury and the injured person. The effort to define the non-responsibility of the master in the second case, in terms of the relations between the injuring and the injured, has led to much of the confusion that beclouds this subject. The terms "fellow servant" and "common employment" have been so warped and twisted as to be useless for purposes of definition. The term "fellow-servant" is misleading in that, while it is used to define the relations to a common master, it seems to lay stress on the relations between the servants.

If we try to define the scope of the rule of *respondeat superior* in terms of the relation of the injured person to the master, it is at one apparent that there can be no distinction drawn between a servant of high degree in the service and one of low degree. Neither is a stranger to the master in the matter. So far as the rule of *respondeat superior* is concerned, the rank of employment of the servant causing the injury is of no consequence. To the stranger the master is liable for all injuries done by his servants, whether of high or low rank in the service. To one not a stranger the master is not liable, under the maxim, *respondeat superior.*

The same person or corporation may be the master of several enterprises at one. In many cases the enterprises are more or less closely related one to the other, so that there is room for difference of opinion as to whether they are distinct or separate enterprises, or are merely branches of one great enterprise that includes them all within its scope. It is not necessary here—if, indeed, it be possible—to lay down any general rule by which this distinction can be drawn. In applying the rule of *respondeat superior*, the Courts have held that the servant employed in one enterprise is a stranger within the rule to another distinct enterprise conducted by the same person as master.

It is only as negativing the existence of such a relation to the master that the terms "*fellow*-servant" and "*common* employment" have any accurate meaning in defining the law of this subject. The looseness with which these terms have been used in the decisions leaves them without definite meaning to-day.

The right of a servant to recover, by virtue of the rule *respondeat superior*, is confined to the exceptional case where he is injured in the conduct of an enterprise distinct from that in which he is employed.

So much then for the liability of the master, by virtue of the principle expressed in the maxim, *respondeat superior*, i. e., by virtue only of his relation to the person causing the injury.

II. Next, let us consider briefly the second ground on which the master may be held liable. This we have called his liability by virtue of his relation to the person injured.

In Priestly v. Fowler, Lord Abinger, C. B., said:

"But in truth the mere relation of the master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information and belief."

In Farwell vs. Railroad Corporation, Shaw, C. J., said:

"We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant, whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam engine; whether this would depend upon an implied warranty of its goodness and sufficiency or upon the fact of wilful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company—are questions on which we give no opinion."

It is now well settled that the master's liability to his servant, by virtue only of the relation of master and servant, is a liability in tort for negligence.

"When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. This is the law of England, no less than the law of Scotland. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or ought to know, that it is not so. And if from any negligence in this respect damage arise, the master is responsible." (Patterson v. Wallace, 1 Macqueen, 748, 751.)

"It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability." (Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642, 647.)

Negligence is, of course, a relative term. What constitutes negligence on the master's part depends entirely on what duties the law imposes upon him as master. It is not necessary here to try to specify all the duties which the law so imposes. We wish only to call attention to the character of the master's liability. It is a liability for negligence, that is, a liability for failure to discharge a legal duty imposed by reason of his relation as master to the injured person.

Now, if the master entrust to an agent or servant the performance of his (the master's) duties to his other servants, and one of the latter be injured because the agent or servant to whom the performance of the duty was entrusted has failed to perform it, in such case the master is liable.

He is liable not because the servant to whom was entrusted the performance of the duty was not a *fellow-servant* of the injured, or was not in the *common* employment with the injured one. The master is liable not because the rule of *respondeat superior* applies to make him liable for injury caused by the neglect of his servant.

The master is liable because *he* has failed to perform a duty imposed by law. It is his own negligence, not that of his servant, that makes him liable. Indeed the servant may have been guilty of no negligence in law, because the duty rested not on him, but on his master.

It may be that the English Courts failed to make this distinction between the master's liability for his servant's act and his liability for failure to perform a duty imposed on him as master. The result may fairly be said to have been a change of the non-liability of the master in the absence of his own negligence into a positive exemption from liability, provided the act or omission of a servant intervened to cause the injury.

The Courts of this country, however, have generally made the distinction noted above, and have been logically consistent in holding the master liable for failure to perform the duties imposed upon him by law. However, in cases where the performance of those duties had been entrusted to agents or servants, our Courts have confused the principle that such delegation or transfer cannot exempt the master, with the principle expressed by the maxim *respondeat superior*. They have thereupon sought to define anew the terms "fellow-servant" and "common employment" to meet the case, as if the master's liability arose by reason of his servant's negligence and not from his own. The conflict of decisions in our State Courts is due in great part to the failure of some of them to distinguish the master's liability for his negligence, a liability by virtue of his relation to the injured person, from the master's liability under the rule of *respondeat superior*, a liability by virtue of his relation to the person causing the injury. This distinction is of the utmost importance from the fact that often the same man discharges many different duties in the service of his employer. For instance, in the service of many railroad companies a servant called "yard-master," in charge of a freight yard, has the duty of employing and discharging the hands that work in the yard; he also takes frequently an active part in shifting the cars, &c., doing the same work performed by the hands. If he negligently employs incompetent hands, and by reason of their incompetence another servant be injured, then the railroad company is liable to the injured one. If this liability be by virtue of the principle of *respondeat superior*, then it must be because the yard-master is not a fellow-servant in a common employment with the yard-hand. Therefore, if a yard-hand be injured because the yard-master has turned a switch at the wrong time, the company is liable for the injury, since the yard-master is not a fellow-servant in a common employment with the injured servant. Such is the reasoning that has brought to this Court the case at bar.

Now, if it be pointed out that the company's liability for the employment of incompetent hands, in the case supposed, has nothing whatever to do with the principle of *respondeat superior*, and is not by virtue of the company's relation to the yard-master; but on the other hand that it is by virtue of the company's relation to the injured servant, for violating a duty toward him from which the company could not relieve itself by employing the yard-master to perform it, then the whole course of reasoning above outlined fails, and it becomes at once apparent that such liability gives no ground for tinkering the terms "fellow-servant" and "common employment." Those terms have no application whatever in defining the liability of the master for negligence in not performing the duties imposed by law upon him as master.

III. We can not better illustrate the importance of the distinctions which we have sought to make clear in the foregoing discussion, than by examining with some particularity the two leading decisions in Ohio in actions for damages by injured employes against railroad companies. The decisions of the Courts of last resort of almost all of the other States, are, as a whole, in accord with the cases that we have already cited. They do not, perhaps, draw our distinctions; they use different terms in definition, but they lay down the same general principles that we have stated, though many arrive at their conclusions by different reasoning. On the other hand, the Ohio decisions have ingrafted on the law in that State, a doctrine that in Pgh. Ft. W. & C. Rwy. Co. v. Devinney, 17 Ohio St., 198, 211, is stated thus:

> "That exception is this, that where one servant is placed in a position of subordination to and subject to the orders and control of another servant of a common master, and the subordinate servant, without fault of his own, and while in the performance of his duty, is injured through the negligence of the superior servant while acting in the common service, an action lies in favor of the inferior servant so injured against the master."

The first case was that of Little Miami R. R. Co. v. Stevens, 20 Ohio, 415. The declaration alleged that the defendant railroad company possessed a railroad running from Cincinnati to Springfield, and two certain locomotives with railway cars attached to each, the one thereof running from C. to S. and back again the ensuing day, the other running from S. to C. and back the ensuing day, which locomotives, with their respective trains, were accustomed to meet and safely pass each other at Plainville, by express direction and arrangement of the defendant; and, whereas, the plaintiff, at the time, &c., was employed by the defendant as engineer upon one of said locomotives, and was accustomed to stop at Plainville and there to safely pass the other locomotive; and, whereas, by reason of the premises, it became the duty of the defendant, by its agents and servants, to give the plaintiff due and timely notice of any change in the place of meeting and passage of the said locomotives and trains; yet the defendant, by its agents and servants, not regarding its duty as aforesaid, did change such place of meeting and passage from Plainville to Columbia, without giving the plaintiff due and timely notice thereof, whereby, on the very day the change went into effect, whilst the plaintiff was proceeding, in the capacity of such engineer on one of the locomotives with a train, from C. to S., according to the previous express direction and arrangement of the defendant in that behalf, between Columbia and Plainville, the other locomotive unavoidably ran against and came into collision with that on which plaintiff was, and crushed the same, whereby plaintiff was wounded, &c., &c.

From the bill of exceptions, it appears that time-cards had been issued by the superintendent and delivered to all the engineers and conductors except Stevens, giving notice of the change in the time and place of passing. The times and places of passing had been previously governed by similar cards, also furnished the engineers and conductors by the company, in accordance with the custom of the company, by which the engineers and conductors were notified of all changes in the times and places of passing. Stevens stopped at the new passing point, but the conductor told him the change did not take effect until a subsequent day, and told him to go on.

The case was argued in the Supreme Court of Ohio before Hitchcock, C. J. and Caldwell, Ranney and Spalding, JJ. Caldwell, J, delivered the opinion of the

Court; Hitchcock, C. J., delivered a separate opinion; Spalding, J., dissented. Caldwell, J., after stating the facts, and that the main question is the liability of the company to Stevens for the negligence of the conductor, says:

"It is a general rule that a person in the management of his business, whether he does it himself or acts through agents, must so conduct that business as not to interfere with the rights of or produce injury to others. This devolves on the party care and prudence in the management of his business, and renders him civilly responsible for any injury that may result to others from the want of such care and prudence, whether the injury may be done under his own immediate supervision or under the control of agents. This doctrine is founded on reason. * * *

"Indeed, the rule is not only a reasonable one, that the employer should make good the injuries thus done by the carelessness of his agents, but it is necessary as a preventive of mischief and a protection to the community that it should be strictly adhered to. The rule is founded on the principle of justice between man and man, and, abstractly considered, is of universal application. There must be some good reason for taking any case without its application."

To the principle *respondeat superior*, as here defined, there is no limitation. Under this, the employer insures the employed against injury in the service.

The learned Judge proceeds:

"It is said, however, that when a party contracts to perform services, he takes into account the dangers and perils incident to the employment and receives wages accordingly. Take this for granted, and we think it falls far short of sustaining the main proposition. If the party does contract in reference to the perils incident to the business, he will only be presumed to contract in reference to such as necessarily attend it when conducted with ordinary care and prudence. So far as an implied contract in reference to the business will be presumed, it will be on the hypothesis that the business is to be properly managed. He can not be presumed to have contracted in reference to injuries inflicted on him by negligence—by wrongful acts. An express stipulation would at least be necessary to make it a part of the contract. The employer has paid him no money for the right to break his legs, or, as in this case, to empty on him the contents of a boiler of scalding water. It was not the expectation when the company hired Stevens that the two trains should be run by different cards, and thus come in collision.

"When a man employs another to do work for him, each incurs his obligations. The person hired is bound to perform the labor according to the agreement, and the employer is bound to pay; besides that, neither party has parted with any of his rights. The employer has no more control over the person he has employed, outside of the service to be rendered, than he has over the person of any other individual, *and is equally accountable for an injury to it.*"

It will be noted that Judge Caldwell adopts the "contract theory," the theory stated in the report of the minority of the committee of Parliament. His conclusion leaves the employer liable equally to employes and to strangers. This conclusion certainly disposes of the case. But there seems to have been a glimmering in the judge's mind of the idea that the negligence in the case was that of the company itself and not merely the negligence of the conductor, for which the company was answerable by virtue of the maxim *respondeat superior*. This idea can be gathered only from disconnected statements.

"In this case the evidence leads the mind irresistibly to the conclusion that Stevens had not received a card or any certain information that the change was to take place on the day of the collision. The effects of a collision are so dangerous that it was certainly the duty of the company to furnish him with that information.

The opinion then takes up the question of contributory negligence and disposes of it thus:

"When we take into account the fact that Stevens had not received the ordinary notice of the change, and the fact that he was told that the change did not take place until a subsequent day by the person who had the control of the cars and the right to give him his orders as to running and stopping, we do not think that there was evidence showing negligence on his part.

"Stevens had engaged to labor for the company in a subordinate capacity. He has received the injury from the negligence of those placed over him by the company, as the jury has found, and we do not see why the company are not liable to him for the amount of the damage he has sustained."

After treating the question of public policy, he continues:

"We could easily suppose a case where two persons employed by the same individual and standing on a perfect equality—where the business was managed as much by one as the other—where they would stand on the same footing as men in the community generally do, in which the employer would not be liable for an injury done to one by the negligence of the other. But we regard this case as standing on entirely a different footing."

As the learned judge had already laid down the rule that the employer would be liable to his employe by virtue of the principle *respondeat superior* equally and by the same principle as he would be liable to a person not his employe, the supposible case must be one in which the employer would not be liable to a stranger. But really it is impossible to trace any definite course of reasoning in the last extracts. They are simply disconnected expressions of a confused mind.

The next paragraph, which we need not quote, shows that the learned judge misunderstood the reasoning in Farwell v. Railroad Corporation, 4 Metc. 49, although he recognized that his reasoning was in conflict with C. J. Shaw's.

The syllabus of the Stevens case states the points decided thus:

> 1. "Where an employer placed one person in his employ under the direction of another, also in his employ, such employer is liable for injury to the person of him placed in the subordinate situation by the negligence of his superior.
>
> 2. "When a railroad company places the engineer under their employ under the control of the conductor, who directs when the cars are to start, stop, &c., the company are liable to the engineer for an injury received, occasioned by the negligence of the conductor, whilst they are both engaged in their respective employments."

It is this syllabus that has fixed upon the law of Ohio "the rule of superior and subordinate." The reasoning of Judge Caldwell's opinion has long since been discredited by the Ohio Court. His views on the scope of the principle *respondeat superior* have been discarded and are expressly overruled in Pgh., Ft. W. & C. R. R. vs. Devinney, 17 Ohio St., 198.

Hitchcock, C. J., in his opinion places the decision in favor of Stevens on very different ground. He says (20) Ohio. p. 436 et seq.

> "I concur in the opinion of the Court affirming the judgment of the Court of Common Pleas; and it seems to me that this may be done without conflicting at all with the authorities which have been cited by the plaintiffs in error. If this case were, in its principal features, like any one of those reported and referred to, I should hesitate long before I would consent to disregard those decisions. They were decisions made by highly respectable tribunals, and by men whose opinions are entitled to the highest consideration. But in each case referred to as being decided in the United States, the action was commenced for an injury received by one employe or servant of the company, in consequence of the neglect or default of another employe or servant of the same company, both at the time being engaged in the running of the cars.

"This case, as it appears from the bill of exceptions, is entirely different. The neglect complained of is not the neglect of an employe or servant of the company upon the road, but the neglect of the company itself, so far as an incorporated company can be chargeable with neglect.

"It appears that the company determine upon the places where the trains shall pass each other, when running the same way or different ways. Through their superintendent they furnish their engineers and conductors with cards, stating the several places where the trains are to pass, with other instructions, by which the engineers and conductors are to be regulated in running. * * *

"Here was negligence, in consequence of which, an injury resulted to the defendant in error. It was not the negligence of any employe of the company assisting in running the cars; unless, by possibility, the conductor of the train had been notified of the change, of which there is no satisfactory proof. But it was the negligence of the company itself, or of its immediate agent, the superintendent of the road, * * *

"The superintendent is a proper representative of the company, and, perhaps, to a certain extent, the conductor of a train may be. But the employes or servants of the company, engaged in making or repairing their road, or in running their cars cannot be held to be their agents.

"It is because this injury resulted from the negligence of the company itself, or of an agent whose duty it was to give the notice before referred to, that I hold the judgment should be affirmed; and it seems to me the case is entirely different from those referred to in the books."

The next case was that of C. C. & C. R. R. Co. v. Keary, 3 Ohio St., 201, also a collision case. The syllabus of the decision states the following points:

1. "It is a settled maxim of the common law, founded upon the highest obligations of social duty, that everyone shall use his own and so prosecute his lawful business, as not by his negligence or want of care to injure others. Hence the law exacts of him who puts a dangerous force in motion that he shall control it with reasonable care and skill.

2. " He cannot divest himself of this obligation by committing its control to another, but he still remains liable upon the maxim, *respondeat superior*, for such injuries as arise from the negligence or carelessness of his agent while engaged in the prosecution of a business.

3. "These principles apply where a railroad company place a brakeman in their employ under the control of the conductor, the latter having the exclusive command of the train, and the breakman, without fault on his part, is injured by the carelessness of the conductor. In such case the brakeman is entitled to recover of the company for the injury; the conductor being the sole and immediate representative of the company upon which rested the obligation to manage the train with skill and care.

4. "But a principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service, and no power or control is given to the one over the other. They stand as equals to each other, and are alone liable for the injuries they may occasion.

5. "This distinction arises from the nature of the relation of master and servant, and from the express and implied obligations incident to the contract of service. As between *them* the company undertakes to furnish suitable machinery and apparatus and control it with prudence and care. The servant undertakes to obey and perform as he is directed; the company, reserving to itself the power of control, as between it and the servant, assumes the obligation to do it with care and skill, and the failure to do so, whether arising from the fault of the corporation, or its representative appointed for the purpose, is a breach of this obligation.

6. " But when the failure occurs in that branch of the service committed by the principal to the subordinate servants, it is their fault, and not that of their employer, and a breach of their obligations, and not his; and where they enter the service with a knowledge that several are to be engaged, each takes upon himself the hazards of the employment, including that of negligence by fellow servants, and public policy equires that they should be interested in exercising supervision over each other.

7 "The agent or officer intrusted with power and control over the subordinates and the operations of the business, is not engaged in a common service with them, admitting of joint participation; nor is he, in any just sense, their fellow-servant; but their employments are separate and distinct, although both are necessary to a successful result in the business.

8. "The case of Stevens v. Little Miami R. R. Company, 20 O. R. 415, examined and affirmed."

It will be seen that the Stevens case is affirmed substantially on the ground taken by C. J. Hitchcock in his opinion. The reasoning in the Keary case is not that of Judge Caldwell. Judge Ranney delivered the able opinion in the later case. There is no statement of facts in the report of the case. In the opinion, the facts are assumed to be substantially identical with those of the Stevens case. The plaintiff, a brakeman, was injured in a collision caused by conflicting train orders. It is left an open question whether the superintendent or the conductor was responsible for the existence of the conflicting orders.

With the conclusion that the company was liable to the brakeman so injured, we take no issue. Grant the proposition that it is the duty of the company to issue orders for the running of its trains, and the duties follow to have those orders proper ones and to have them reach the servants who are to put them into execution. The only question, then, is whether the conductor is a servant charged with the execution of those orders, or a servant charged merely with the conveyance of them. The effect of the Ohio decisions is to hold that the engineer of the train is the servant charged with the execution of such orders, and that the company has not discharged its duty till the orders reach the engineer. The decisions in other States hold that the conductor is the executive servant in such a case. The difference is not one of principle.

But the question to what rule shall be ascribed the obligation of the company to issue orders, to see that they are proper ones and are properly transmitted, is a question of principle, and an important one.

Judge Ranney traces the obligation to the principle expressed by the maxim, *sic utere tuo ut alienum non laedas*, but at the same time ascribes it to the principle *respondeat superior*, as though the two principles were equally broad.

Indeed, he seems to give as wide scope to the latter principle as to the former. The former principle lies at the foundation of our law of tort, and the principle of *respondeat superior* is doubtless an application of it. The principle on which the obligation of the company toward its employes rests may also be an application of it, but that is far from proving that the principle of the obligation is the principle of *respondeat superior.*

Judge Ranney's own statement of points shows that the obligation of the compaey cannot be ascribed to the principle of *respondeat superior.* He says the company is liable to the brakeman for the negligence of the conductor, but that "a principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service, and no power or control is given to the one over the other." "This distinction," he says, "arises from the nature of the relation of master and servant, and from the express and implied obligations incident to the contract of service. As between *them*, the company undertakes to furnish suitable machinery and apparatus and control it with prudence and care." Thus the distinction is due to the character of the obligation itself, which is defined by the relation of master and servant existing between the company and the injured person. But by the judge's own definition the rule of *respondeat superior* has nothing to do with the injured person. The obligation of the principal under that rule arises solely by virtue of his relation to the person causing the injury. The judge's fifth point demonstrates the error of his second point.

It was the failure to note the importance of the distinction between the liability of a principal by virtue of the maxim *respondeat superior*, and the liability of a master by virtue of his obligations to his servant growing out of the relation of master and servant *between them*, together with the necessity of giving some reason for the rule of superior and subordinate established by the Stevens case—it was these reasons that induced the propositions laid down in the seventh point.

Having in mind the common statement that the master is not liable to one servant for injury caused by the negligence of a fellow-servant in the common employment, the Court felt compelled to explain its decision in the terms of that statement. The seventh point, therefore, states the following propositions:

> "The agent or officer intrusted with power and control over the subordinates, and the operations of the business, is not engaged in a common service with them, admitting of joint participation; nor is he, in any just sense, their fellow-servant, but their employments are separate and distinct; although both are necessary to a successful result in the business."

We have already pointed out that the terms "fellow-servant" and "common employment" have no application in defining the master's *liability* for failure to perform the obligations imposed by law upon him as master; that the only application of those terms in defining the master's *liability* is in defining and limiting his liability under the principle of *respondeat superior*. We also pointed out that the use of those terms to mark the limit of the master's liability under the principle of *respondeat superior* is apt to mislead, because what the terms are meant to express are the respective relations of the injuring and the injured each to the master of the same enterprise, and yet the terms *seem* to emphasize the direct relation between the injuring and the injured, one toward the other. The Ohio Court was so misled.

The absurdities that follow the attempted application of the propositions stated in the seventh section of the syllabus are the best illustration of their fallacy. For instance, the conductor is not the fellow-servant of the brakeman in a common employment, and therefore the company is liable to the brakeman for the negligence of the conductor; but the company is not liable to the conductor for the negligence of the brakeman, because the brakeman is the fellow-servant of the conductor in a common employment. The conductor of a train is not a fellow-servant of the brakeman or the engineer on the same train, but every conductor of every other train running on the road is the fellow-servant of that brakeman and that conductor, and in a common employment with both. (Railroad Company v. Devinney, 17 Ohio St., 198.) Moreover, the employes engaged in repairing track are fellow-servants in a common employment with the train crew, conductor, engineer, brakeman and all. (Whalen v. Mad River & L. E. R. R. Co., 8 Ohio St., 249.) In the last case the terms "fellow servant" and "common employment" are used in their proper meaning. In the Keary case, they are used to describe the direct relations between the servants, one toward the other.

A slight examination will show that the Ohio rule of superior and subordinate rests on no sound distinction, either under the principle of *respondeat superior* or under the principle that the master is liable for failure to perform the duties toward his servants imposed by law upon him as master. We have already shown that such a distinction cannot be drawn under the principle *respondeat superior*, and that the Ohio decisions themselves have followed the proposition to its *reductio ad absurdum*.

The rule coincides with no distinction under the second principle stated. It is true that under this principle the master is not relieved from liability to his servant for failure to perform his duty by the fact that he may have entrusted the performance of the duty to another servant, although the injury may be traceable primarily to the nonperformance of the servant so trusted. (Railroad Company v. Herbert, 116 U. S. 642, 647.) But the Ohio rule of superior and subordinate goes beyond this. It seeks to draw an arbitrary line—a line that does not in fact exist in the organization of any business enterprise—between what it terms superior servants and what it terms subordinate servants, and then holds the master responsible to the so-called subordinates for all acts and omissions of the so-called superiors, whether those acts and omissions be in the discharge of duties imposed by law on the master, or merely in the performance of service as operatives. To illustrate, suppose a train to reach a side track must pass two switches, one of which is manned by a brakeman and the other by the conductor of the train; and suppose that in passing the switch manned by the brakeman the locomotive is derailed by the carelessness of the brakeman in turning the switch, and the engineer is injured—in that case the railroad company is not liable to the engineer. But suppose the locomotive is derailed at the second switch by the carelessness of the conductor in turning that, then under the Ohio rule the company is liable to the engineer for any injury received by him.

We submit that the Court below erred in laying down the law as to the liability of the plaintiff in error to Baugh.

We have intentionally refrained, as far as possible, from citing cases.

The Court will find the recent cases collected and digested in 48 American and English Railway cases, pages 283 to 448.

We wish to call attention particularly to the reasoning and the citations of authorities in

Ell v. Northern Pac. R. Co., 48 A. & E. Rwy. Cas. 318; and

Miller v. Southern Pac. R. Co., 20 Oregon, 285; 48 A. & E. Rwy. Cas. 294; also to note on page 318.

B. There was no conflict of testimony in this case. The Court should have decided the question whether upon the facts proved the plaintiff was entitled to recover. The question was one purely of law. Its submission to the jury was error.

The only possible escape from this error is to contend that the Court below must have found the defendant liable in law on the facts proved, and, therefore, the error of submitting the case to the jury did not harm the defendant.

If our view of the law is correct, the point of law to be decided by the Court below, was this:

Do the facts show a failure by the defendant to perform a duty imposed by law upon it as the master of the plaintiff, by virtue of the relation of master and servant between them?

We say that Hite, the engineman, and Baugh, the fireman, engaged in operating the same locomotive, were servants of the same master, employed in the same business; that the principle of *respondeat superior* does not extend to make the common master liable for the negligence of his servant, to another servant employed in the same business; and that, therefore, the master of Hite can not be liable to Baugh, only because Hite's negligence caused Baugh's injuries.

The law did not impose on the master the duty of guaranteeing Baugh against the negligence of Hite, because the principle of *respondeat superior* did not apply, and no other principle of law imposes such a duty even in favor of strangers to the business. The railroad company could not be liable because it was Hite's master. Could it be liable because it was Baugh's master?

Here were two men who had made this same "run" day after day, and who were familiar with the road and with the rules of the company. Baugh's own testimony proves that the instructions issued by the company for their guidance were perfectly clear, and that they understood them fully. (Record, pages 44, 45, 46 and 47.)

There is no testimony to prove that Hite and Baugh had any special orders. Baugh testifies in chief:

"Q. Now, Mr. Baugh, do you know of any orders that were received that morning by your train?

A. Yes, sir.

Q. What do you know of?

A. All I know is an order thrown off while we were at Burr's Mills, and I gave it to the engineer, and he told me to let him out; that we would go.

Q. What was that order?

A. At same time? I do not know.

Q. Do you know what it was?

A. No, sir." (Record, page 40.)

He testifies further:

"Q. Did you receive any orders as you went west that morning at Lewis' Mills?

A. I don't know.

Q. On your helper, who received the orders?

A. The engineer did. He received all the orders.

Q. When you left Lewis' Mills you passed Belmont. Was there any orders thrown you there or were you notified in any way of anything?

A. No, sir." (Record, pages 41–42.)

On cross-examination he testifies:

"Q. Didn't you know that you had to get orders at Lewis' Mills?

A. I knew we always did get orders at Lewis' Mills.

Q. And didn't you see them that day?

A. No, sir." * * * *

"Q. You did not have any orders that morning?

A. I do not know whether we had orders or not." (Record, page 44.)

"Q. Do you remember writing any orders yourself that morning?

A. I remember of writing an order, when laying in the side track, to flag down. He told me to do it.

Q. What was that?

A. He says: 'If them fellows don't come before this other passenger train coming east was due, that we would flag down;' and he told me how to write the order and I wrote it, and this train came before this train coming east was due." (Record, page 45.)

"Q. Didn't you tell Mr. Hite that you were familiar with that, and didn't you tell him how the engineers, when they got into a pocket were in the habit of getting out?

A. He asked me if I ever wrote any orders.

Q. Tell us about that?

A. He says: 'We will flag down.' He says: 'You will have to make out an order,' and I says, 'all right,' and he says for me to do it.

Q. And then you did it?

A. Yes, sir.

Q. And that was the order that you started to run on?

A. Yes, sir.

Q. The order that you wrote for the engineer; that is, the order you started to run on?

A. Yes, sir." (Record, page 46.)

The only orders, therefore, were those Baugh wrote himself.

The rules of the company gave Hite and Baugh no discretion. They required special orders even to run "wild," (i. e., keeping off the time of all scheduled trains by a margin of ten minutes.)

In the absence of special orders they must wait on the side track until orders were received or until the opportunity offered to follow some regular scheduled train on its time, getting it to carry the proper signals to warn trains coming in the opposite direction that their locomotive was following.

Baugh's testimony shows that both he and Hite fully understood that this method of running was the only one permitted by the rules that they could adopt to get back to Bellaire, and that they had prepared to follow passenger train No. 15, the next scheduled east-bound train. Before No. 15 came, the second section of No. 92 west-bound, passed. "When that section came up" they "pulled right out and started down the road." (Baugh's testimony, Record, page 48.)

The company had done all that could be done to prevent the act that caused this collision. The act was a direct violation of the company's instructions, knowingly committed.

"It may be conceded that it is the duty of a railroad corporation to prescribe, either by means of time tables or by other suitable modes, regulations for running their trains with a view to their safety; but it is obvious that obedience to these regulations must be entrusted to the employes having charge of the trains. Such obedience is matter of executive detail which in the nature of things, no corporation can personally oversee, and as to which employes must be relied on." Johnson, J., in Rose vs. B. & A. R. R. Co., 58 N. Y. 221.

We submit that the accident in which Baugh was injured can be traced to no failure of the plaintiff in error to perform any duty it owed him as its servant.

C. At the time when Hite and Baugh "pulled right out and started down the road," Baugh not only knew that action to be a violation of the company's rules, but he knew also that this very passenger train with which their locomotive came into collision, was on the road "some place" between them and Bellaire.

"Q. What was the process—what right had you to go back after you got to Burr's Mills or the turn table? You had no right to the track at all, unless you had orders, had you?

A. No, sir; didn't have no right without orders." (Baugh's testimony, Record, page 47.)

"Q. Did you know that there was a local train coming out about that time?

A. I knew there was a local train on the road some place.

Q. Between you and Bellaire?

A. Yes, sir."

(Same, page 49.)

When Baugh rode on the locomotive, knowing what he admits that he knew, he assumed voluntarily the very risk that caused his injury; and he can not recover.

Wescott v. New York & M. E. R. Co., 153 Mass. 460;
Hammond v. Chic. & Grand Trunk R. Co., 83 Mich. 334;
Railway Co. v. Leach, admr., 41 Ohio St. 388.

The Court below should have directed a verdict for the defendant as requested.

JOHN K. COWEN,
J. H. COLLINS,
HUGH L. BOND, Jr.,

Counsel for Plaintiff in Error.

149 U S 368

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89

NO. 13,636.

SUPREME COURT OF UNITED STATES.

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Plaintiff in Error.

vs.

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

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The first assignment of error, to-wit: "The court erred in overruling the demurrer of the defendant to the petition of plaintiff." We pass over without further notice.

The second assignment of error: "That the court in sustaining the demurer of plaintiff to the second answer of defendant as amended." The demurrer of the plaintiff was general. "The plaintiff demurs to the second answer of the defendant in its amended answer, and for cause says the same does not state facts sufficient to constitute a defense." This second defense was intended to be a plea in bar. It is fully set out in the Record and shows that the plaintiff below, John Baugh, was a member of a certain Baltimore & Ohio Employees' Relief Association, and had been for some time before the injury complained of in this action; and that during the time he was such member he had paid into the funds of such Relief Association a sum of money. It also shows that the object of said Association, as set out in the Constitution, Article No. 2, was to provide for its member while they are disabled by accidents, sickness, or by old age, and at their death for their families. It will be seen upon an examination of the second defense, or answer, as it is termed, of the railroad company, that the plaintiff, Baugh, after his injury, brought suit before a Justice of the Peace upon this contract for indemnity and had recovered a small sum of money, and this suit brought by the plaintiff below upon his contract is set up in this action by way of a bar to the same. The parties defendant in the action upon this contract are not the same as in the action at bar. The defendant in the action brought before the Justice was the Baltimore & Ohio Employees' Relief Association. It is true the Baltimore & Ohio Railroad Company for certain considerations guarantee to those investing in this scheme the payment of money by way of relief to persons entitled to the same, but the plaintiff, in the case plead in bar, proceeded against the Relief Association as the other party to the contract. Passing the matter of parties by, the cause of action in the case plead in bar was upon a *contract* between Baugh, the plaintiff, in that action, and the Relief Association, his rights in that action against the Relief Association were upon contract and were much broader than in the action at bar. He had a right upon his contract to relief in case of sickness, in case of accident, whether the railroad company was in fault or otherwise. The cause of action in the case at bar is one sounding in tort; it is an action ex delicto; the case plead in bar is ex contractu. We think that we need make no reference to authorities upon a principle so plain, however, for convenience we cite Bigelow on Estopel, his chapter upon Domestic Judgments and the cases therein cited are clear as to the above principle.

The questions in the two cases are not identical. The question in the case plead in bar was, "Did Baugh become a member of the Relief Association? Had he paid in his money? Had he complied with the requirements of the Constitution of the Relief Association?" In the case at bar the question was one as to the negligence of the defendant below, The Baltimore & Ohio Railroad Company, and as to its liability to him for the injuries he sustained by reason of such negligence.

It is insisted, however, by plaintiff in error, that as the constitution of the Relief Association contained a clause setting forth that "As it is not contempleted in this scheme to give double benefits in cases of disability or death resulting from accidents, the benefits herein promised shall not be payable nor paid when the contributors or any person entitled to damages because of the accident to him, whether resulting in death, or not, has or makes a claim against said company or any of the companies operating its branches or divisions (including the Chicago division) until there be first filed with the committee a release satisfactory to them, releasing said companies from such damages, signed by all persons entitled to the same." That is, the scheme of this Relief Association is to require of their employees when injured, a release of the Baltimore & Ohio Railroad Company from an action for damages against the railroad company before paying over money *upon the contract.* If that was a part of Baugh's contract—if it was fairly entered into, there might be some question possibly as to whether Baugh could recover upon his *contract* or not, until he had released the company from his cause of action by reason of their negligence. We do not concede that such is the law; but if such is the case it certainly goes no farther. If the court in which Baugh brought his suit upon his contract heard the case, and tried it, there may have been some mistake or error in the finding of the court in that case, but there is nothing that prevents Baugh from bringing his suit for the negligent acts of the railroad company and recovering from it by reason of the clause quoted above. There is no inconsistency in the position taken by the plaintiff below. He was a member of the Baltimore & Ohio Railroad Relief Association. in good standing; he had paid his money into that Association; he was entitled to the benefits of that association by reason of its contract with him, and if he has brought suit to recover what he was entitled to by reason of its contract that fact is not inconsistent with his present action.

The defendant claims that the ground of defense set out in its second defense in its amended answer, make a contract between Baugh on the one side and The Baltimore & Ohio Railroad Company, and The Relief Association on the other. We do not at all agree with this claim of the defendant, but on the other hand claim that it shows a contract between Baugh and the Relief Association alone. The Act of Incorporation of the Relief Association (Rec. p. 21) says:

"It shall be a condition precedent to the making of any engagements by this association for either of the above mentioned purposes. That the directors of the Baltimore & Ohio Railroad Company, shall, by resolution guarantee the faithful performance of the *obligations* of the association, which shall make no contracts beyound such guarantee, or after the repeal of the resolution authorizing the same."

Here it is plainly indicated that it is the Relief Association that is to make the "engagements," and the Railroad Company is to guarantee the performance of the "obligations" of the Relief Association. Not the "obligations" of the Railroad Co. There would be no sense in requiring it to guarantee the performance of its own obligations.

Again, the "application for membership" referred to in the second defense of the amended answer, (a copy of which is found on p. 17 of the Record,) is the only paper ever signed by Baugh. It is addressed to the Relief Association. All of its stipulations and covenants are made with the Relief Association, and no covenant is made with the Baltimore & Ohio Railroad Co.

Again, Article 23 of the Constitution (Rec. p. 29) provides, "All the benefits offered by this society are guaranteed by the Baltimore & Ohio Railroad Company."

In short, the contract is made between Baugh and the Relief Association, and the Baltimore & Ohio Railroad Guarantees or is surety for the performance of the obligations of the Relief Association.

Now the suit before the Justice was against the Relief Association. The Baltimore & Ohio Railroad was made a party because it was a guarantor. (Required by law to be a guarantor before the Relief Association could make a contract with Baugh or any one else.) See Act of Incorporation, Rec. p. 17.

Now the result of this is, that the Railroad Co., in an action of tort brought against it, has plead in bar, an action upon a contract, made with a Relief Association, to which contract the Railroad Co. was not a party.

Now it will be observed that there is no stipulation anywhere that Baugh is not to sue the Railroad Company. Such a stipulation between a railroad company and its employee is void as against public policy. (See Railroad Co. vs. Spangler, 44 O. S., p. 471.) The "scheme," as it is called, is transparent. It is a fraud from beginning to end. It is an attempt on the part of the Baltimore & Ohio Railroad Company to make its employees insure themselves for its benefit, by compelling them to become members of this Relief Association, (a sort of Insurance Co.) and the employee is compelled to join this Relief Association. (See Article 4, Rec. p. 26.) This "scheme" is cunningly devised, but we submit that it does not have length and breadth sufficient to cover the negligence of the plaintiff in error, and that the plea in bar is not well taken.

We pass over the third assignment of error, also the fourth. The fifth assignment, that the court erred in its charge and which is excepted to by the defendant.

The court, in its charge to the jury, submitted to them the question as to the relation between the engineer, Hite, and Baugh, the plaintiff, as follows: "Now it is for you to decide, upon the testimony, what the relation in fact of Hite, the engineer, and Baugh, the plaintiff, was. Were they fellow servants in the sense in which I have defined that expression, or was Baugh the subordinate, and was Hite, the engineer, the representative of the company placed over him to direct and control his actions ?"

If they were fellow-servants the plaintiff has no right to recover, whatever injury he may have sustained. If Hite, the engineer, was the agent or representative of the company, and Baugh, the fireman, acted under his direction and subject to his orders and the injury resulted from the default or negligence or wrong of the engineer, why then it must be attributed to the company as the negligence, default, or wrong of the company, and it is for you to say."

The evidence upon this point is contained in the testimony of the plaintiff, Baugh, and the rules of the company. The rules are found on page 54 of the printed Record. Rule 9 provides that "trains are run under the charge of the conductors thereof, and their directions relative to the management of trains will be observed except in cases where such directions may be in violation of the rules of this company or of safety, in which cases *engineers* will call the attention of the conductors to the facts as understood by them and decline compliance; conductors and enginemen being in such cases held equally responsible."

In the same rule: "Whenever a train or engine is run without a conductor the engineman thereof will be also regarded as conductor and will act accordingly, &c."

Now, Baugh's testimony in brief shows that he was a fireman on a helper that had gone from Bellaire, west, some twenty miles, on the morning of the accident, and had been detached from the train that it had been a part of until it reached the top of the grade, and was waiting for a chance to return to Bellaire; it had no schedule to run by. The engineer, by the rules, had full charge and control of the engine. It is insisted that he could not, without orders, go upon the main track, and that he was bound to wait orders from the train dispatcher before going out upon the main track, and that he and Baugh both knew this fact. Suppose they did; whilst they were waiting at Burr's Mills there was—as the testimony of Baugh shows—a consultation between him and his engineer as to the manner of returning to Bellaire. A perfectly safe one was suggested by one or both of them, that was, to remain where they were until an east bound passenger train that was due—as the testimony shows—*in about two hours,* should pass that point, then by writing an order the engineer of the helper could have the engineer of the passenger train put out the red signal flags that would permit him to follow with his helper on the schedule of the passenger train. Such an order was prepared; it was arranged that Baugh could board the passenger train with this order, see that the flags were put out, and that Hite was to follow down the grade with the engine to the next stopping place, but the east-bound passenger train *did not get to Burr's Mills* before a train that was, perhaps, a section of the same train that the helper had gone to the top of the hill with, going west, came along and Baugh says in his examination in chief, page 39 and 40:

Q. Now, Mr. Baugh, do you know of any orders that was received that morning by your train?

A. Yes, sir.

Q. What do you know of?

A. All I know is an order thrown off while we were at Burr's Mills, and I gave it to the engineer, and he told me to let him out; that we would go.

That order, if the engineer received any, was not produced. The switch was opened and he went out upon the main track and started down the grade. Baugh had no right to discuss that matter with the engineer; no right to read or open the order. If it had been a question raised between the engineer and conductor in charge of a train we see what is required by the rules, but Baugh had no time-table; he was under the direction of the engineer; he was there to obey his orders. Baugh received no orders from the train dispatcher at Newark; he received his orders direct from the engineer; and it was his duty to obey them. And when the engineer, after receiving whatever order was thrown off (which, presumably from all the testimony in the case, was an order to return wild to Bellaire) started out negligently and carelessly upon the schedule of a passenger train that he should have known was on the road somewhere between him and Lewis' Mills. We think it was clearly a question of fact to be determined by the jury from the testimony as to what the relations existing between Hite, the engineer, and Baugh, the fireman, were. See Wood on Master and Servant, page 848 and notes.

We need not refer to the law of this case as we claim it to be upon the testimony, further than to refer to the decisions of this Court in Chicago, Milwaukee & St. Paul Ry. Company vs. Ross, Error to the Circuit Court of the United States for the District of Minnesota. U. S. Reports 112, and cases there cited.

The other assignments of error are all disposed of, as we think, in the question raised upon the charge of the court.

Respectfully Submitted,
L. DANFORD & JAMES C. TALLMAN,
Attys. for Defendant in Error.

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NO. 13,636.

SUPREME COURT OF UNITED STATES.

THE BALTIMORE AND OHIO RAILROAD COMPANY

vs.

JOHN BAUGH, Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO.

Supplemental Brief for Defendant in Error.

JAMES C. TALLMAN AND L. DANFORD,
Attys. for Defendant in Error.

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THE BALTIMORE AND OHIO RAILROAD COMPANY,

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Supplemental Brief for Defendant in Error.

We desire in this case to file a supplemental brief. The court will remember that the defendant in error filed his brief long before the plaintiff in error filed its brief. We did this through fear that there would not be sufficient time after the plaintiff in error had filed its brief to prepare and print brief for defendant in error; as a result of this, most of the brief of defendant in error related to a point not now insisted on by the plaintiff in error, and three-fourths of the record in this case relates to a question that is now abandoned.

A great deal is said about the order that Baugh wrote. In our judgment it cuts no figure in this case, *because it was never acted on.* Baugh says, (Rec. p. 46) "This kind of an order was for me to get on the engine to show to the engineer that we would follow him down."

This order was never delivered. They did not *start to run on this order* as is claimed by plaintiff in error. The train going east that they intended to follow down did not come until the second section of 92 had passed them going west, (from which train an order was thrown off and delivered to Hite, the engineer, or conductor for the time being.)

Now, while Baugh (Rec. p. 46) says:

Ques. "The order that you wrote for the engineer that is the order that you started to run on?

Ans. "Yes, sir."

Yet it is obvious that was a mistake. (Possibly the question was not understood by Baugh.) In his re-examination (Rec. p. 48) the matter is made perfectly plain.

Q. You were on a side track at Burr's Mill; what train were you waiting there for? Was there a train coming east that was about due?

Ans. "Yes, sir."

Q. What number was it?

Ans. "No. 15."

Q. What was it?

A. "Accommodation train."

Q. You proposed to write an order and give it to the engineer of that train to flag you, so that you might follow on his time to Bellaire?

A. "Yes, sir."

Q. And that is what was talked ahout, and that is what was written there?

A. "Yes, sir."

Q. Would that have been a safe way to come down, and the usual way, on the time of another train, if they took the precaution of having it flagged?

A. "Yes, sir."

Q. Was that order delivered to any engineer?

A. "No, sir."

Q. You left there, in fact, before 15 got to Burr's Mills?

A. "Yes, sir."

Q. And left there after the coming west of the second section of 92, or 32 whichever it was?

A. "Yes, sir."

Q. When that section come up you pulled right out and started down the road?

A. "Yes, sir."

Now, if the helper had started to run down behind the train going east it would have been a perfectly safe way. This is conceded in the second paragraph of the brief of plaintiff in error, p. 35.

Now, if Baugh had started to run on the order he wrote, as claimed by plaintiff in error, train No. 15 would have had the collision. It is evident that counsel for R. R. Co. have sadly misapprehended the situation in this respect.

Now, let us look for a moment at the circumstances: Baugh and Hite were at Burr's Mills; there was no telegraph station there; none nearer than "eight miles," (Rec. p. 38) and there was only two ways for them to get out; one was the way suggested by Baugh, or Hite, that was "to flag down" and run in behind train "No. 15" going east on its time. The other was to wait until some order was thrown off at Burr's Mills by a train.

Q. And they can get no telegraphic orders on their return until they reach Lewis' Mills?

A. "No, sir, not unless some train brings them orders." (Rec. p. 52

They were not required to walk eight miles to a telegraph station, and they could get orders in no other way except they were thrown off from some passing train. *Was this done? and was that the order on which Hite ordered Baugh to open the switch?*

Baugh testifies, (Rec. p. 40.):—

Q. Now, Mr. Baugh, do you know of any orders that was received that morning by your train?

A. "Yes, sir."

Q. What do you know of?

A. "All I know is, an order was thrown off while we were at Burr's Mills, and I gave it to the engineer, and he told me to let him out, that we would go."

Q. What was that order?

A. "I don't know."

Q. Do you know what it was?

A. "No, sir."

Q. What happened after you gave your engineer that order?

A. "He told me to let him out."

Y. What did happen immediately after you gave that order to your engineer?

A. "We started to go."

Q. Who opened the switch?

A. "I did."

And (Rec. p. 48) aBugh testifies:

Q. You left there in fact before 15 got to Burr's?

A. "Yes, sir."

Q. And left there after the coming west of the second section No. 92 or 32 whichever it was?

A. "Yes, sir."

Q. When that section came up you pulled right out and started down the road?

A. "Yes, sir."

Now, it will be remembered that Hite and Baugh were talking about "flaging down" behind the next train going east, No. 15, (Rec. p. 40) but before it came along the second section of 92 came along, going west, this order was then thrown off the train. Baugh did not see it; did not read it, but delivered it to his engineer, (or *conductor for the time being*) and was ordered by him to opeu the switch.

Now, the R. R. Co. objects when we want to know the contents of this order. (Rec. p. 40.) It offers no evidence and keeps the contents of this order carefully concealed as far as it can. Presumably this was an order to do just what engineer Hite did do, viz. "Pull out on the main track aud start east."

This was the order that Hite acted on. Baugh never saw it; had no right to see it. He had no watch and no time card. The day before the accident the time card was changed. (Rec. p. 50.) The yardmaster had instructions not to give time cards to firemen and brakemen. (Rec, p. 50.) Baugh testifies that he was under the directions of the engineer, and that the engineer received all the orders. (Rec. p. 41&42.)

When this helper formed part of a freight train going west and was under the direction and control of a conductor, there might be some reason in regarding Baugh and Hite as fellow servants; but when the helper was cut loose from the train it then became a train itself, and the rules of the company provide who shall act as conductor in such case. Rule 9 (Rec. p. 55) reads:—

"Whenever a train or engine is run without a conductor the engineman, (i. e. the engineer) will also be regarded as conductor, and will ACT ACCORDINGLY." Here we see that by the rules of the company Hite was *acting* as conductor after this helper cut loose from the train, and was *acting* as *conductor* when he ordered Baugh to "open the switch" after the second section of 92 came along and threw off the order heretofore referred to.

Now, aside from the written rule above referred to, who did the R. R. Co. expect to control the movements of the helper when it cut loose from the train? The yardmaster testifies (Rec. p. 51) that the engineers of helpers usually get orders at Lewis' Mills "to return wild, (that is keep out of the way of regular trains that run on schedule time.)

How could Baugh have any say in the movements of the helper, when the orders of the yardmaster was "not to give him any time card;" (Rec. p. 50) when he did not have a watch, and was not required to have one?

It is perfectly plain that the situation was just as Baugh testified, (Rec. p. 41) "He was under the control and direction of the engineer when the helper was cut loose from the train. This was so intended by the R. R. Co. as shown by their directions to the yardmaster. (Rec. p. 50) and rule 9, (Rec. p. 55.)

Now, it is very evident that the injury to Baugh was not caused by any negligence of his own. He obeyed his engineer, WHO, FOR THE TIME BEING BE IT REMEMBERED, WAS ACTING AS HIS CONDUCTOR. It was his duty to do this. Counsel for R. R. Co. charge him with negligence in their brief, p. 36, because he knew "there was a passenger train somewhere on the road between them and Bellaire." The time card had been changed the day before the accident. Baugh never saw this time card. The schedule time of the passenger train might have been made two hours later or earlier than before for ought he knew, and even if it had not been changed it might have been two hours late for ought he knew. *His knowledge* of this train under these circumstances, would not excuse him in refusing to obey the orders of his CONDUCTOR FOR THE TIME BEING when he ordered him to "open the switch," and he would not be guilty of negligence in so doing.

Baugh was purposely put by this defendant R. R. Co. into a position where he would be compelled to act "by faith, alone" and not "*by sight*," for the reason that he had no right to SEE the telegraph orders. He could not SEE the time card. He had no watch. "OBEDIENCE AND FAITH" seems to have been required of him in this case as it is in religion.

It is equally clear that his injury was caused by the gross negligence of the R. R. Co., either through its train dispatcher in sending a wrong or mistaken order to Hite, or through its *conductor for the time being* in the management of this helper. Counsel for the R. R. Co. claim that the orders of the Company were disobeyed. What order of the company, pray? A telegraph order was thrown off the second section of 92 at Burr's Mills; it was delivered to the man the R. R. Co. had made *conductor* of the helper. He immediately ordered us to "open the switch," and we did it. *The R. R. Co. had better show what this order was* before it *charges anybody with disobeying orders.*

Counsel for R. R. Co. concede (Fourth Par. Brief, p. 35) that it is the duty of railroads to prescribe by means of time tables or otherwise, regulations for running their trains, with a view to their safety. *Yet hiding their time tables; delivering orders to the conductor of the helper,* (Baugh having no knowledge of time table or orders) he is openly charged with negligence and a violation of orders.

Some confusion appears to exist in the minds of counsel for R. R. Co. growing out of their idea of the Ohio rule of superior and subordinate servants. (See their brief, p. 31) where a train reaches a side track and must pass two switches, one of which is manned by a brakeman and the other by the conductor of the train, and the locomotive is derailed by the carelessness of one or the other in turning the swith, and the engineer is hurt.

They claim the engineer could not recover under the Ohio rule for the injury reseived at the switch manned by the brakeman, but could recover for the injury received at the one manned by the conductor.

No such absurd conclusion follows under the Ohio; or any other ruile. The *conductor* is simply a *brakeman* when he opens the switch He is a *conductor* when he is on the train giving orders. The engineman is an *engineer* when he opens the throttle. He is a conductor when he orders a switch opened by his subordinate, placed by the company under his control.

Counsel for R. R. Co. confuse themselves by paying attention to *names* by which servants are called, instead of the *capacities* in which they act. But the law pays attention to the *capacity* and not the name; to the *substance* and not the *shadow*.

Hence this is not a case of a brakeman or fireman being injured by the negligence of his engineer, as these terms are ordinarily understood in "railroad parlance," but is the case of a fireman being injured by the negligence of the company or the conductor of its train under whose orders he was placed.

We respectfully submit that no error was committed and ask that the judgment be affirmed.

JAMES C. TALLMAN AND L. DANFORD,
Attys. for Defendant in Error.

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